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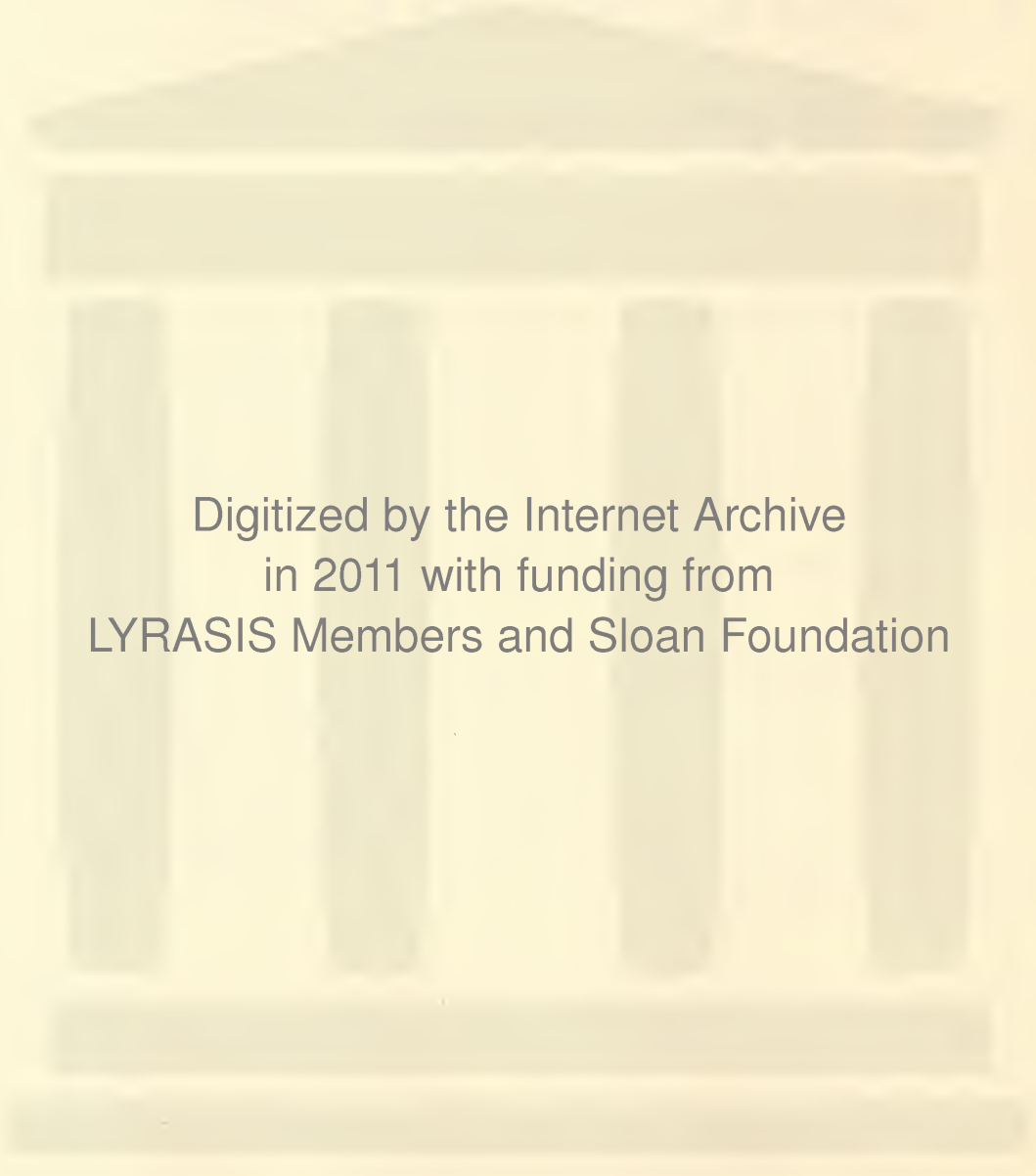

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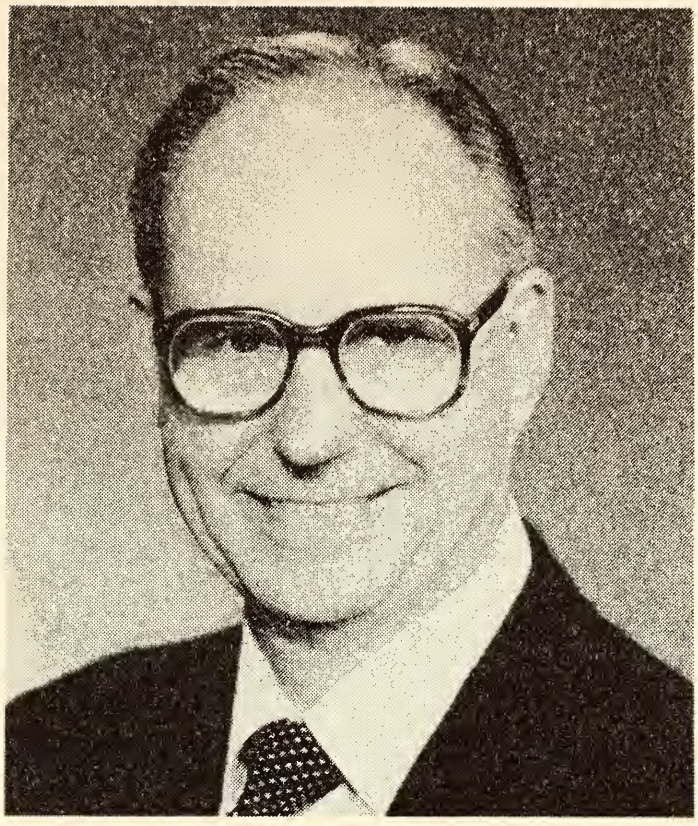

DAVID A. FUNK
RETIREMENT TRIBUTE

Education:

University of Missouri, Columbia, Missouri, Fall, 1945.
Harvard College, Cambridge, Massachusetts, Spring, 1946.
The College of Wooster, Wooster, Ohio, B.A. 1949.
Western Reserve University, Cleveland, Ohio, LL. B. 1951.
(LL. B. designated J.D. by Case Western Reserve University, Cleveland, Ohio, 1968.)
The Ohio State University, Columbus, Ohio, M.A. 1968.
Case Western Reserve University, Cleveland, Ohio, LL. M. 1972.
Columbia University, New York, New York, LL. M. 1973.

Legal Employment:

1951-60	Funk & Funk, Wooster, Ohio.
1960-69	Funk, Funk & Eberhart, Wooster, Ohio.
1962-63	Visiting Lecturer, The College of Wooster, Wooster, Ohio.
1969-72	Funk & Funk, Wooster, Ohio.
1973-76	Associate Professor, Indiana University School of Law—Indianapolis.
1976-97	Professor, Indiana University School of Law—Indianapolis.
1997	Professor Emeritus, Indiana University School of Law—Indianapolis.

Subjects Taught at Indiana University School of Law—Indianapolis:

Practice-oriented:

Subject	Semesters	Students
Professional Responsibility	22	1,231
Business Associations	9	572
Fiduciary Administration	11	555
Wills & Trusts	3	235
Future Interests	3	75
Legal Writing	3	44
Totals	51	2712

Perspectives:

Subject	Semesters	Students
Jurisprudence	21	201
Sociology of Law	24	325
World Legal History	21	389
Comparative Law	24	320
Advanced Research	5	7
Totals	95	1242

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TWO LIVES IN LAW

DAVID A. FUNK*

My journey through twenty-one years of law practice and twenty-four years as an Indiana law professor, may provide hope to anyone in a similar situation.

I was born in Wooster, Ohio, on April 22, 1927. My great grandfather wanted to be a lawyer but did not have the education; he became an insurance and real estate agent in Wooster, Ohio. My grandfather practiced law in Wooster from 1885 to 1921, and then became an appellate judge in Akron, Ohio, for fifteen years. My father practiced law in Wooster from 1919 to October, 1972, when he died unexpectedly.

Preparation

In Wooster High School, I was active in intermural extemporaneous speaking and debate. After graduation, I served one year in the United States Navy and was sent to the NROTC programs at the University of Missouri and Harvard College, respectively. After being discharged, I had almost finished a B.A. at The College of Wooster, Ohio, (majoring in economics but leaning towards philosophy) when I enrolled in the Western Reserve University School of Law. The following summer, between my first and second years of law school, I completed my B.A. requirements. In my fifth semester at Western Reserve, I added two history courses (medieval English and modern Far Eastern).

From Practitioner To Professor

After graduation from law school, I joined my father in the practice of law in Wooster, Ohio. The first five years I emphasized real estate transactions and did the things a young lawyer gets asked to do. The next seven years I mostly represented small, often feuding, corporations. The last nine years I emphasized estate planning and administration.

During this period, I studied adult education Russian for two years. In the 1962-63 school year, I taught a course in U.S. Constitutional Law in the political science department at The College of Wooster. In 1963, I first visited Scotland, which had been a special interest since college.

In 1964, I embarked on seven years of part-time graduate study. The first four years I completed an M.A. (largely in political theory) at The Ohio State University, 100 miles away. The next three years I completed an LL. M. (largely in jurisprudence and international law) at Case Western Reserve University School of Law, sixty miles away.

In 1972, I left practice to pursue full-time graduate law study at Columbia University in New York. At Columbia, I studied mainly jurisprudence, legal history, comparative law and legal education. I also outlined and started *Group Dynamic Law.*[1] Wolfgang Freidmann, whose jurisprudential reputation had drawn

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* Professor of Law Emeritus, Indiana University School of Law—Indianapolis.

1. DAVID A. FUNK, GROUP DYNAMIC LAW: INTEGRATING CONSTITUTIVE CONTRACT INSTITUTIONS (1982).

me to Columbia, immediately comprehended and approved the outline for my project. The book was published in New York by Philosophical Library in 1982, and a symposium celebrating its theme was published there in 1988.[2]

Indiana Law Professor

Indiana University School of Law—Indianapolis offered me a position in 1973. The previous professor of jurisprudence and comparative law had just left, so I was able to teach those courses. I was also able to teach sociology of law. When the legal history teacher retired in 1976, I converted that course into world legal history.

Along the way I also taught various traditional courses to second and third year students. Of almost 4000 students, about two-thirds were in my practice-oriented courses and about one-third were in one of my perspective courses. Also, about two-thirds were in the day division and about one-third were attending at night. About 950 wrote senior essays for my courses

The Future

After retirement, I will be spending more time with my wonderful wife, Sandra. Then, when my home "research institute" is operating, I can finish writing "Traditional Jewish Jurisprudence: Justifying Jewish Law and Life," the next chapter for my book in progress on *Oriental Jurisprudence.* In addition I will do some serious reading *not* for a client, class, or publication. Also, I can resume some former musical interests (playing and listening) that I had to give up when I undertook graduate study and entered teaching. Finally, I can participate more actively in Scottish-American, German-American, historical, and religious activities.

For those who have followed my story thus far, a final thought. Autobiography exudes a certain inevitability. Often the things that just happened to me turned out well. Many awful things that could have happened did not. I can only conclude that this journey required both God and me. I hope that He will look out for each of you, too, as you wend your ways through the successes and disappointments of your lives in the law.

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2. GROUP DYNAMIC LAW: EXPOSITION AND PRACTICE (David A. Funk ed. 1988).

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ARTICLES

*R. Bruce Townsend Professorship Inaugural Lecture**

THE AMERICAN LEGAL FAITH: TRADITIONS, CONTRADICTIONS AND POSSIBILITIES

DAVID RAY PAPKE**

One might assume that my consideration of law's role in American culture began while I was either a law student or a graduate student in American Studies. If not then, my work must have begun when I became a university professor teaching in both a law school and a school of liberal arts. In fact, I was much slower to take up the subject, and it was only in 1986-87, during a Fulbright year at Tamkang University in Taiwan, that I started in a sustained way to scrutinize law's role in American culture.

Time and again, my Taiwanese students called on me to reflect critically on my assumptions about law. Surely, they said, I did not really think a U.S. Supreme Court decision could really alleviate racial stress and inequality.[1] Race relations are much deeper than anything law could touch. Certainly, they added, I could not think a proposed equal rights amendment would lead to significant change for American women.[2] Gender is so much more fundamental than any words in the U.S. Constitution. I was naive, my students insisted, in thinking law was all that important. Like many Americans before me, I was manifesting what

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* The R. Bruce Townsend Professorship was established at the Indiana University School of Law—Indianapolis in the fall of 1996. The Professorship is named for R. Bruce Townsend, renowned legal scholar and beloved teacher at the School from 1946 to 1982. The inaugural lecture was delivered on November 20, 1996.

** R. Bruce Townsend Professor of Law, Indiana University School of Law—Indianapolis; Professor of Liberal Arts, Indiana University-Purdue University at Indianapolis. A.B., 1969, Harvard College; J.D., 1973, Yale Law School; Ph.D. in American Studies, 1984, University of Michigan.

1. The reaction was provoked, of course, by *Brown v. Board of Education*, 347 U.S. 483 (1954).

2. Phyllis Schafly's contention in opposition to the amendment struck a chord with my Taiwanese students. To wit: "Reasonable people do want differences of treatment between men and women based on the obvious factual differences, namely, that women have babies (and men do not) and that women do not have the same physical strength as men." CONG. DIG., June-July 1977, at 191.

one scholar has called an "uncanny American reverence for law."[3] From the Taiwanese perspective, this seemed silly.

But was it? To be sure, Americans are not particularly law-abiding or even especially knowledgeable about the niceties of the law. American crime rates are high. We lead the world in the percentage of the population formally incarcerated, and studies have confirmed a striking American ignorance of what the law actually says.[4] Yet despite this, Americans, at least traditionally, have had a legal faith. We have historically placed law on a pedestal, have valorized it and elevated it. A belief in law has been central to our ideology, in our sense of ourselves as a people, in our culture as a whole. As I studied law's role in American culture, I concluded that attaching importance to a Supreme Court opinion or constitutional amendment was not naive. Opinions and amendments—laws generally—*are* significant in the context of the world's most legalistic culture.

After a few words of definition, I hope in the comments that follow to trace the development of the American legal faith. I will address both the nineteenth century and the twentieth century, focusing on what I take to be three crucial components of the legal faith: the Constitution, the courtroom trial and, most ambitiously, the rule of law itself. The Constitution, I will argue, is an icon of the legal faith, the trial is a ritual, and a belief in the rule of law is the faith's first and most important teaching. Does the faith continue to compel and direct us in the present? Is the faith likely to play as large as role in the American future as it has in the American past?

I. INTRODUCTORY DEFINITIONS

Given the audacity of discussing a subject as large as law's role in American culture in one lecture, I had best set out my terms carefully—if only for defensive reasons. How do I define "culture"? What do I mean by "law"? In what sense could law be the basis of a "faith" in American culture?

"Culture" is one of the most interesting and complicated terms in the English language, and sometimes debates about culture boil down to conflicting definitions of the term itself. "Culture" is a term that has come to be used for key concepts in several intellectual disciplines and in several distinct and incompatible systems of thought. The oldest meaning perhaps involves notions of tending and cultivating, with subsidiary meanings of honor and worship. We find this meaning embedded in such modern terms as "horticulture" or "agriculture." But beyond husbandry, the term from at least the sixteenth century onward also referred to the development of human learning and conduct. Hence, "culture" came to denote the pattern of human knowledge and behavior that groups of humans transmitted from

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3. Daniel J. Boorstin, *Editor's Preface* to ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT at vi-vii (1960).

4. For a discussion of the Hearst Corporation's 1983 study of public knowledge of law, see Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 L. & SOC'Y REV. 185, 186-87 (1987). *See also* Martha Williams & Jay Hall, *Knowledge of Law in Texas: Socioeconomic and Ethnic Differences*, 7 L. & SOC'Y REV. 99 (1972).

one generation to another. "Civilization" is sometimes used as a synonym, but with the use of this synonym, still a third important meaning emerged, namely, the varieties of knowledge and behavior that showed one was truly civilized. Music, literature, painting and theater seemed to some what we meant by "culture." In some nations governments even charged ministries of culture with nurturing these varieties of culture.[5]

The second of the meanings—the one most anthropological in nature—is most crucial in my remarks, but I am mindful of how complicated even that single meaning is when applied the collective knowledge and behavior of the United States. We have never had a national culture comparable to the coherent, integrated culture of a tribal group. In the United States there have always been racial, class, ethnic and regional variations. Hence, I should note that for the purposes at hand I will emphasize not all of American culture but rather the dominant American cultural beliefs and behaviors. These, traditionally, have been most generated by and subscribed to by those on the top of the American pile: white, Anglo-Saxon Protestants with money. As for "law," a second key concept in my remarks, I am not particularly concerned with the precise legal prescriptions and proscriptions. Yes, we have them. Armed with a computer one might even be able to count them all up on federal, state and local levels and then show that on a per capita basis Americans have more laws than any other people. Some have deplored this, speaking of a curious indigenous malady known as "hyperlexis."[6] Former Chief Justice Warren E. Burger seemed imbued with this very quantitativeness when he criticized the American law explosion.[7]

But when I speak of "law," the rules and statutes and ordinances are not what I have in mind. "Law is like an iceberg," Iredell Jenkins has said, "only one-tenth of its substance appears above the surface in the explicit form of documents, institutions, and professions, while the nine-tenths of its substance that supports its visible fragment leads a sub-aquatic existence, living in the habits, attitudes, emotions and aspirations of men."[8] The latter are what intrigue me. What can we say about the dominant culture's "sub-aquatic" understanding of law?

As already suggested, this understanding, in my opinion, has an element of "faith" about it. This term customarily has religious connotations, and what I want to call the "legal faith" is not a religion in the strictest sense. There is no godhead. A formal priesthood and church do not exist. But still, the dominant American culture has tended to approach law with some of the belief, trust, allegiance and fidelity more commonly accorded to conventional religious belief. The "legal faith," for better or worse, is one of the defining characteristics of Americanism. The "faith" merits rediscovery and underscoring even if its viability in the present remains an open question.

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5. For an excellent discussion of the wide range of meanings attached to the term, "culture," see RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 76-82 (1976).

6. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977).

7. Warren E. Burger, *Isn't There a Better Way*?, 68 A.B.A. J. 274 (1982).

8. IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW at xi (1980).

II. LEGAL FAITH IN THE NINETEENTH CENTURY

Although the American legal faith came to flower in the nineteenth century, its seeds of course were planted earlier. Contemplation of the intriguing figures of Thomas Paine and Thomas Jefferson offer some hint of what the American legal faith would become in the nineteenth century.

Paine is a fascinating figure. Few would have predicted on the basis of what had happened to him in England that he would find success and prominence upon arriving in the North American colonies in 1774. His uncirculated vita included a bankruptcy, two unsuccessful marriages and false career starts as a grocer, tobacconist and corset-maker. However, Paine was a sharp political thinker and writer. He had an edge. His publication in 1776 of *Common Sense*, a lengthy pamphlet, met with tremendous approval. It sold over 100,000 copies in just three months, and its call for independence did much to fuel the colonists' revolutionary fire.[9]

Of special interest is a passage in *Common Sense* that attempts to assure colonists that they can go forward without a king. Such a step could make one nervous, Paine admits. We've grown accustomed to having a monarch. But there is an alternative. Americans could solemnly set aside a day to honor their legal charter. More specifically, Paine said, bring forward that charter itself, place it on top of the Bible, and then place a crown on top of it all. The whole world would then know, Paine said, "that in America the law is king."[10]

This image would have caused no shortage of consternation for most of the Europeans who began settling in North America 150 years earlier, but by the late eighteenth century law and legal institutions had taken on increased importance in colonial society. Against the backdrop of modernization, a reliance on rational/legal systems of authority came gradually to replace an older reliance on status and rank. The changes did not occur overnight. They were not complete and all-conclusive. But by the end of eighteenth century many Americans had come to see legal rights and duties as the keys to relationships, legal institutions as devices to avoid chaos and preserve liberty, and law-abiding conduct as something highly ethical.[11]

Paine captured this sentiment, and the sentiment itself inspired the drafters of the Declaration of Independence, the most important of whom is Thomas Jefferson. Jefferson was very much a lawyer, having studied law at the College of William and Mary and in an apprenticeship. He even at one point taught

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9. Useful biographies of Paine include: ALFRED OWEN ALDRIDGE, MAN OF REASON: THE LIFE OF THOMAS PAINE (1959); NOEL BERTRAM GERSON, REBEL! A BIOGRAPHY OF TOM PAINE (1974); ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA (1976).

10. THOMAS PAINE, COMMON SENSE, *in* THE COMPLETE WRITINGS OF THOMAS PAINE 29 (Philip S. Foner ed., 1969).

11. *See* PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 62-63, 96-121 (1992); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 19-34 (1993).

himself Anglo-Saxon in hopes of better understanding the origins and nuances of the common law.[12] The preamble of the Declaration includes the stirring invocation of natural rights that school children to this day memorize, but unbeknownst to many of those school children, the Declaration hardly ends with the preamble. It continues, scholars have noted, much as would have a bill in equity of Jefferson's era, complete with an attempt to establish jurisdiction, identification of the parties, a list of wrongs, a request for remedy and even a concluding oath. Jefferson could have used the same form to ask a Virginia court sitting in equity to enjoin a farmer from marching his cows over a neighbor's garden.[13]

Even more importantly, the Declaration's content was highly legalistic. The King, it seems, has refused to assent to desirable laws, forbidden his governors to pass laws, and abolished valuable colonial laws and charters. The King has also assembled legislatures at unusual times, unduly dissolved these bodies, refused to establish courts, used salary and tenure to manipulate judges, and generally harmed the most crucial of legal institutions. The King, really, was the one who had been disrespectful of law and in a profound sense "illegal." In ways that no doubt appealed to Thomas Paine, the Declaration of Independence launched one of the most curious of revolutions: one that purported to be law-abiding and law-respecting!

After the Revolutionary War and in the early nineteenth century, confidence in law and legal institutions became an even larger part of American ideology. The Constitution became an icon through which one could worship in the legal faith. The courtroom trial, as observed in person and as evoked in newspapers and fiction, served as an important secular ritual. Most importantly, a belief in the rule of law became the central doctrinal commitment of the legal faith. During the first half of the nineteenth century individual Americans and the nation as a whole turned frequently to this faith for self-definition and meaning.

A. The United States Constitution as Icon

To think of the Constitution as an icon might seem strange. Our textual charter perhaps. Our fundamental law. But an icon? My argument is that believers in any faith need something concrete through which they can worship. An icon can provoke devotion, reinforce belief. It is a door, if you will, that opens onto the faith. Walk through it, and one might explore all that the faith entails. The Constitution, I suggest, became this type of entry for the American legal faith.

The Constitution's iconic character was evident as early as the ratification process. Even though the Constitution was heartily debated, there were rallies and parades whenever a state ratified it. The parade in Philadelphia deserves an award for excessiveness. It included city officials, clergy of every denomination, units of light infantry and cavalry, each trade dressed in distinctive working clothes and

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12. *See* ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 53 (1984).

13. *See* PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 71-79 (1990).

carrying a display related to the trade. In addition there was a literal ship of state, named *The Union*, and another float shaped like an eagle, drawn by majestic steeds and featuring a giant representation of the Constitution. Although this float might have been expected to steal the show, the much discussed "New Roof" was even more symbolically striking. The float presented the Constitution as a roof-like structure supported by thirteen pillars and presumably sheltering the Republic. It was drawn by ten white horses, ornamented with bright stars, and crowned at the very top with the figure of Plenty and her sprawling cornucopia.[14]

Between 1800 and 1850 schoolbooks routinely spoke of the Constitution as divinely inspired and glorious. The Washington Benevolent Society, other civic organizations, and profit-seeking entrepreneurs produced countless facsimiles and elegant reproductions as well as banners, wall hangings and even handkerchiefs with all or part of the document.[15] Americans could and did carry the Constitution with them. Presidents and plenty of other politicians praised and invoked the Constitution, and a man such as Daniel Webster attempted to build a whole career on the veneration of the Constitution. "I believe that no human working on such a subject, no human ability exerted for such an end, has ever produced so much happiness as the Constitution of the United States," Webster said.[16] The Constitution, he was sure, was "complete and perfect, and any change could only result in marring the harmony of its separate parts."[17] The Constitution was "the basis of our identity, the cement of our Union, and the source of our national prosperity and renown."[18]

Webster was even involved in what was the most bizarre example of Constitution worship from the first half of the nineteenth century. It involved President William Henry Harrison. He is not a President about whom Americans know much, and there is a good reason for that. After standing out in the rain greeting well-wishers after his 1841 inauguration, Harrison caught a severe cold, retired to his death bed, and passed away after only one month in office. Perhaps it was his just desert for earlier in life sneaking up on and slaughtering an Indian village in the so-called "Battle of Tippecanoe." Webster, in any case, was present at Harrison's death and along with four others prepared Harrison's death notice. The notice reported that the last utterance from Harrison's lips was a fervent invocation of the Constitution.[19] Even when invoked by someone in the cold

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14. *See* E.L. DOCTOROW, *A Citizen Reads the Constitution*, THE NATION, Feb. 21, 1987, at 211, 211.

15. A fine collection of facsimiles and reproductions is housed at the New York Public Library.

16. Brooks D. Simpson, *Daniel Webster and the Cult of the Constitution*, 15 J. AM. CULTURE 15, 15-16 (1992).

17. *Id.* at 17.

18. *Id.* at 16.

19. 4 JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 22 (Washington, Government Printing Office 1897). For quotations from various early-nineteenth-century Presidents regarding the Constitution, see MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 15-16, 61-62, 70-71 (1986).

ground, the Constitution could objectify mythic tales of the legal faith, unlock attitudes and assumptions, promise order, and invite patriotism.

B. The Courtroom Trial as Ritual

If the Constitution as an icon allowed contemplation of the mysteries and meanings of the legal faith, the trial became the most important ritual of the faith. Each new trial not only reached a verdict in the case at hand but also reinforced the faith. Like rituals in a conventional faith, the trial provided reassurance that there was a community of believers.

This, too, might seem a strange perception, but recall that in the nineteenth century courtroom trials had a different social standing than they do today. In rural areas the judge and lawyers often rode circuit, and their arrival at the county seat was much heralded. Not only the participants but also the simply nosy descended on the courthouse to watch, argue, and sometimes picnic on the lawn. Trials were probably *the* most dramatic manifestation of government in rural America.[20] In the cities, government did not rely as much on courts to establish its identity as it did in the country, but courtroom trials were nevertheless followed carefully. They were significant civic "events," and the leading trial lawyers were some of the most prominent people in the land. According to the era's lawyer and treatise writer St. George Tucker, "The cabinet maker is known in his town; a good physician for 100 miles; a lawyer throughout America."[21]

And indeed, one did not have to attend a trial to follow it. Periodicals of the period covered courtroom trials extensively and also published separate trial reports.[22] The daily penny press emerged in the 1830s and 1840s, and it counted trial reporting as one of its staples. The penny dailies were chock-full of trial reporting, and it is asserted that James Gordon Bennett's *Herald*, a New York City daily, tripled its circulation in 1836 by giving two months of front-page coverage to the trial of a man alleged to have killed a prostitute with a hatchet.[23] Readers, many of whom were first-generation literate, could find in the trial reports a forum for denouement, a locus for resolution of social problems, and an expression of community norms.

Furthermore, readers did not even have to rely on the factual. Cheap fiction also began rolling off the presses in this era, and story-papers and nickle novels were full of trial accounts.[24] The legal historian Maxwell Bloomfield has located a largely forgotten body of popular nineteenth-century novels concerning heroic

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20. *See* FERGUSON, *supra* note 12, at 23, 69-70.

21. JACKSON TURNER MAIN, THE SOCIAL STRUCTURE OF REVOLUTIONARY AMERICA 200 (1965).

22. *See* DANIEL A. COHEN, PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE, 1676-1860, at 26-31 (1993).

23. *See* FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY, 1690-1960, at 233 (3d ed. 1962).

24. *See* DAVID RAY PAPKE, FRAMING THE CRIMINAL: CRIME, CULTURAL WORK AND THE LOSS OF CRITICAL PERSPECTIVE, 1830-1900, at 78-80, 100-01 (1987).

lawyers and often culminating in stirring trial scenes. The lawyers customarily are hard-working Protestants who move to the American city from the country. These young men study the law, learn to ride the bouncy currents of modernization, and represent the poor but deserving against the greedy and their shyster attorneys. In the concluding trial scene, prefiguring Perry Mason, justice triumphs.[25]

Through trips to the courthouse, by reading the newspapers and popular fiction, and via simple conversations with fellow citizens, Americans could and did contemplate countless trials. The courtroom trial, like the rituals of traditional religions, was inherently dramatic, and Americans could come to and spring from the cultural image of the trial time and again. For the average American, the ritualized, dramatic courtroom trial did more than establish the guilt and innocence of the defendant. What was right, and what was wrong? Did the laws and legal institutions respect the society's norms and aspirations? What are our individual and collective identities under the rule of law? "In almost every trial," the scholar Carl Smith has written, "there is a second drama going on in addition to the case at hand: the ceremonial enactment of the law itself and the affirmation of the principles, good or bad, by which society is ordered."[26]

C. The Rule of Law as the Central Teaching

If the Constitution was a sturdy icon for the nineteenth-century legal faith, that was not enough. If the popular culture offered countless renderings of the courtroom trial, still more was required. The American legal faith, like all faiths, needed its premises, its doctrines, its system of beliefs. These came in the form of what some have called "legalism," a multifaceted belief in the usefulness, fairness and legitimacy of laws and legal institutions.[27] And this, too, became a part of the dominant American ideology in the nineteenth century, as Americans experienced rapid social change and sought ways to calm their anxiety, as elites shifted and attempted to maintain their dominance. At the center of American legalism and crucial to the legal faith was a commitment to the rule of law.

The belief in the rule of law is somewhat more complicated than one might think. It is not just a belief in rules. It is not simply law-abiding conduct. As part of their legal faith Americans believed that laws were to be made in public, without bias for particular individuals or classes, and with rationality and honest commitment to the public good. Lawmakers were then to expressly promulgate the laws in clear, general, non-retroactive and non-contradictory form. The laws were to be feasible and predictable, and the people were, for the most part, to

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25. *See* Maxwell Bloomfield, *Law and Lawyers in American Popular Culture*, *in* LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS 1, 11-16, 22 (A.B.A. Comm'n on Undergraduate Educ. in Law and the Humanities ed., 1980).

26. Carl Smith, *American Law and the Literary Mind, in* LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS 1, 12 (A.B.A. Comm'n on Undergraduate Educ. in Law and the Humanities ed., 1980).

27. An early and influential discussion of legalism is JUDITH N. SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS (1986).

know them or at least be able to find them out. Officials applying the law, especially judges, were to be fair and impartial, and the application process was to treat similar cases in similar ways, extending due process, free from public pressure, to one and all. When I say the American legal faith of the nineteenth century included at its core a belief in the rule of law, I refer to all of this. Stated more succinctly, Americans believed law should rule men rather than vice-versa.

There are hundreds, indeed thousands of examples of citizens, lawyers, political figures, and even novelists subscribing to this belief, but perhaps one especially striking example will suffice. In 1838 Abraham Lincoln, at that point in time a twenty-nine-year-old lawyer, rose to address the Young Men's Lyceum in Springfield, Illinois. He proposed to those assembled that Americans swear an oath to revere the law:

> Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling-books, and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation . . . .[28]

To a perhaps surprising extent this actually happened, and foreign visitors who traveled in the United States in the nineteenth century perceived it. Well heeled and curious, these visitors wanted to observe how a country might function without an aristocracy, without castes, and without an official church. No Disney World for them, the visitors of a century and a half ago wanted to know how the United States worked as a nation. The minor French nobleman and public servant Alexis de Tocqueville has emerged as the most famous of these visitors, not so much because of his fame at the time but rather because of the volumes he later wrote about what he had observed. Lawyers, de Tocqueville said, were the highest political class, the equivalent of an aristocracy.[29] The people respected judges, completed their civic educations by serving on juries, and accepted courtroom decisions.[30] What's more, de Tocqueville said, Americans respected law itself, a phenomenon he contrasted with the European masses' suspicions regarding law.[31] The language of the law becomes, he said, "a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so

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28. Abraham Lincoln, *Address Before the Young Men's Lyceum of Springfield, Illinois*, *in* 1 COMPLETE WORKS OF ABRAHAM LINCOLN 35, 43 (John G. Nicolay & John Hay eds., Cumberland Gap, Lincoln Mem'l Univ. 1894).

29. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 205 (Henry Reeve trans., Oxford Univ. Press 1946) (1835). For an interesting suggestion that Daniel Webster was the type of American lawyer that de Tocqueville admired, see R. Kent Newmyer, *Daniel Webster as Tocqueville's Lawyer*, 11 AM. J. LEGAL HIST. 127 (1967).

30. *See* DE TOCQUEVILLE, *supra* note 29, at 206.

31. *Id.* at 175.

that the whole people contracts the habits and tastes of the magistrate."[32] More so than even Thomas Paine had imagined, the law had become King in nineteenth-century America. More so than Thomas Jefferson had imagined as he drafted the Declaration of Independence, the nation had come to understand and define itself with reference to law.

III. Legal Faith in the Twentieth Century

American attitudes regarding the law, like American attitudes in general, grew more complicated and contradictory in the twentieth century. On the one hand, there are indications that a legal faith continued to inspire and direct the citizenry. On the other hand, the faith began to wear, weaken and wither. The complexities and contradictions might indicate that the legal faith will eventually lose its central position in American ideology.

With regard to the Constitution, which I have cast as the most important icon of the legal faith, there are some indications that the Constitution maintained its iconic character in the twentieth century. At the time of the bicentennial of the Constitution in 1987, there was one of those iconic avalanches that had also occurred at the time of the centennial in 1887 and at the time of the sesquicentennial in 1937. There were countless facsimiles and reproductions; there were pamphlets and books praising the Constitution as the "soul," "citadel," or "sentinel" of the nation. All of these could be thought of as comparable to the carvings and paintings of the saints in early Christianity, as icons of the faith, albeit the legal one.

Then, too, there is the interesting reaction to Charles A. Beard's, *An Economic Interpretation of the Constitution*.[33] The book was at the time of its writing and is still today arguably the most controversial work of American history ever written. Why? In the book Beard suggested that commercial and property interests had directed the drafting and ratifying of the Constitution. No matter how measured Beard's tone or convincing his argument, his interpretation hardly sat well with Constitution worshipers. President Taft denounced the book as unseemly muckraking besmirching the reputations of the Founders, and Warren Harding attacked Beard's "filthy and rotten perversions" in an article entitled "Scavengers, Hyena-Like, Desecrate the Graves of the Dead Patriots We Revere."[34] Clearly, Beard had ruffled feathers. Beard was literally an "iconoclast," and this sat badly with those anxious to worship through the Constitution in the glories of the legal faith.[35]

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32. *Id.* at 207-08.

33. (1913).

34. Bertell Ollman takes special delight in skewering Taft and Harding for their reactions to Beard's work. Bertell Ollman, *Introduction* to THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, MUCKRAKING, AND ESPECIALLY SOCIALIST CRITICISM 4 (Bertell Ollman and Jonathan Birnbaum eds., 1991).

35. When Constitution worship seemed an impediment to addressing the Great Depression, Max Lerner, Editor of *The Nation*, warned that such blindness could contribute to the emergence

There is, then, some indication that the Constitution has remained iconic in the twentieth century, but there are also indicators that this is ending. At the time of the bicentennial, for example, many flinched at the messy dialogue between former Chief Justice and director of the bicentennial celebration Warren Burger on the one side and Justice Thurgood Marshall on the other. Burger was the traditionalist and gushed about the glories of the Constitution in a way that would have done Daniel Webster proud, but Marshall was of a less traditional mind. How glorious is a Constitution, he asked, that was around for 100 years before it recognized African-Americans as full human beings and citizens? How glorious was a Constitution that took another fifty years to give women the vote?[36] Given these comments from a sitting member of the Supreme Court, as well as recent confirmation fights over Robert Bork and Clarence Thomas, one wonders about the Constitution's ongoing iconic viability. Would Charles Beard's *An Economic Interpretation of the Constitution* cause any kind of stir if it were published today?

As for the trial, which I have cast as the most important ritual of the legal faith, the signs are also mixed. Trials are portrayed everywhere in our popular culture. Most Americans have never participated in or even witnessed an actual trial, but portrayals of the trial are standard on our front pages, in our movies, our prime-time television programming, our plays, and our novels. These images and motifs are so common in American culture that Americans "naturalize" them; they take them for granted. These scenes are a way we routinely find meaning in our culture, meaning not only concerning the guilt or innocence of individual parties, real and fictional, but also meaning regarding the larger values and norms of our society. Rarely do Americans reflect on the courtroom scene as a convention consciously employed by writers and filmmakers.[37]

However, how inspirational is the courtroom trial ritual in the final decade of the twentieth century? We have had a whole spate of nationally prominent celebrity trials: Lorena Bobbit, Mike Tyson, William Kennedy Smith, the Menendez brothers, and, of course, the one and only O.J. Simpson. These trials are televised. The country stood still when the Simpson jury returned to the courtroom with its verdict. Through each trial the thoughtful observer can garner insights about American life. But, overall, these trials seem to me more entertainment than faith-confirming ritual. How, after all, does one use the Lorena Bobbit farce to worship in the legal faith? In addition, our novels, movies and television shows featuring courtroom trials seem increasingly to challenge the notion that trials are able to deliver truth and justice.[38]

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of American fascism. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1303-05, 1316 (1937).

36. *See* Stuart Taylor, Jr., *Marshall Sounds Critical Note on Bicentennial*, N.Y. TIMES, May 7, 1987, at A1.

37. *See* David Ray Papke, *The Courtroom Trial as American Cultural Convention*, *in* THE LAWYER AND POPULAR CULTURE 103-10 (David L. Gunn ed., 1993).

38. *See* David Ray Papke, *The Advocate's Malaise: Contemporary American Lawyer Novels*, 38 J. LEGAL EDUC. 413 (1988) (book review); A.B.A. DIV. FOR PUB. EDUC. & MUSEUM OF BROAD. COMMUNICATIONS, JUST IMAGES II, LAWYERS AND THE COURTROOM ON PRIMETIME

And what about the rule of law, the notion that this is a country of laws not men, the sense that we can believe in law's ability to guide and direct us? There are several indicators that this fundamental belief is eroding, and one of these indicators is what happens inside the contemporary American law school. The law school traditionally could have been seen as a seminary for the legal faith, as the place where our secular priesthood is trained. But I have been struck for years by what happens to many of the students at this school and by comparable trends reported to me by friends at other schools. Students, it seems, often enter as natural lawyers, that is, as believers in some synchronization between fundamental morality and law. They then convert to legal positivists somewhere in the course of their first or second year, that is, they become adept at spotting rules and applying them. Indeed, they have to be good at this, or they fall by the wayside. Then in the third or fourth year another conversion takes place, at least for many. They move from being legal positivists to being legal cynics. Law is what those with power and money want it to be.

The cynicism that one finds among some, not all, law students is also evident in the population generally and concomitantly antithetical to a belief in the rule of law. Jokes, for example, are often especially revealing in their ability to expose cultural fault lines, and the recent plethora of jokes about law and lawyers is a telling indicator of contemporary cultural attitudes. Americans are not only wisecracking about law and lawyers at the water cooler but also putting together substantial published collections of such jokes.[39] In addition, law and lawyer jokes have acquired a new mean-spiritedness. Law and lawyers are now the source of genuine cultural distrust.

There is also the wide current of contemporary law and order sentiment. Lock up the lawbreakers. Use mandatory sentencing. Be faithful to the letter of the law. But literal legal faithfulness of this sort is not the equivalent of the legal faith I have been discussing. It constitutes in my opinion a legal fetish instead of a legal faith,[40] fetish being understood as an often pathological tendency to invest a material object with magical power and then obsess about it. The belief and trust in law of Thomas Paine and Thomas Jefferson, their allegiance and fidelity, were on a different level.

CONCLUSION

What might the future entail with regard to the legal faith? One could, in concluding this lecture, deliver a vigorous jeremiad. Like the Hebrew prophet Jeremiah, I could now offer a prolonged lament, a tale of woe. I could then call

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TELEVISION (1996).

39. Recent collections of law and lawyer jokes include, but are not limited to, JURIS-JOCULUM: ANTHOLOGY OF MODERN LEGAL HUMOR (Ronald Brown ed., 1989); JOHN B. MCCLAY & WENDY L. MATTHEWS, CORPUS JURIS HUMOROUS (1993); SKID MARKS: COMMON JOKES ABOUT LAWYERS (Michael Rafferty ed., 1988).

40. For a discussion of the tendency toward legal fetishism in western society, see HUGH COLLINS, MARXISM AND LAW 10-14 (1982).

on us to return to the right path, to the true source of our greatness. Such a stance is common in American culture. From Anne Hutchinson to Ralph Waldo Emerson to Eugene Debs to Alan Ginsburg in his poem "Howl," self-conscious Americans have said that this special nation with its chosen people is going to hell in a handbasket. I could place myself in this noble tradition if I now called on us to return to the legal faith that had inspired our founding fathers.

But alas, there is not much of a reactionary prophet in me. I am no Jeremiah. I want to conclude not with a reassertion of the traditional legal faith but with a suggestion regarding what our attitude regarding law might be in the century ahead. How should my children and your children think about law in the future? What are the possibilities?

I think in this regard that the legal faith served the modernizing United States of the nineteenth century well. It also continued to serve through much of the twentieth century. The Constitution did not answer all questions. Courtroom trials were not always inspiring. The rule of law was as much aspirational as it was actual. But the legal faith was beneficially central to our ideology. It was a crucial part of our mythic fabric, myth being understood not as falsehood but rather as the normative stories we tell about ourselves as a people.

But now I sense the page turning. We are, in the language of cultural studies, changing from a modern to a post-modern nation. Our world is increasingly one of images, of multiple selves and identities, of cultural relativism rather than a sense of scientific or God-given truths. The post-modern society might, by necessity, have to be post-legal, or at least we might have to reconceptualize law, to articulate not the traditional legal faith but rather a more modest law-related faith.

For my own part, as my current students have heard too many times, I have adopted a largely discursive model. Law seems to me valuable as a fluid, contested, sometimes contradicted discourse, as one way in which we can think and talk and argue and perhaps find some partial and tentative meanings in our lives.

At first hearing this might not sound like much. What happened to law's glory, magnitude and special place? What happened to law's permanence, its stability and reliability? Personally, I am not sure it was like that in the first place, but what I would like my children to know and think about law is that it is a discourse and process in which creation and recreation can take place. I want them to approach law not as restriction and control but as one of several realms of human possibility. I want my children—all of us, really—to know through law that we are not only culturally constituted but also, as human beings, culturally constituting. Thought of in this way, law might continue to have an extremely important and empowering role in the American culture of the twenty-first century.

LOCAL AUTONOMY OR REGIONALISM?: SHARING THE BENEFITS AND BURDENS OF SUBURBAN COMMERCIAL DEVELOPMENT

SHELLEY ROSS SAXER*

> "There continues to be little or no consensus, and no effective political and administrative mechanisms, for acting responsibly upon local land use initiatives having substantial regional impact."[1]

INTRODUCTION

Land use decisions are generally made solely by local officials elected by and responsible only to citizens within the local municipality. For example, if the City of Westlake Village wants to approve the development of a Price-Costco commercial development within its borders, the neighboring City of Agoura Hills cannot interfere with its decision.[2] If the Village of Hoffman Estates wants to construct an outdoor concert arena, the neighboring Village of Barrington Hills is not consulted.[3] If the City of Ventura approves a new shopping mall which will draw business and revenue away from the neighboring City of Oxnard, Oxnard citizens are not part of the approval process.[4]

Local decisions, however, often impose burdens on citizens outside the local municipality who are excluded from participating in the local decision-making process.[5] In assessing whether to take on commercial projects, local officials must

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1. Roger K. Lewis, *Land-Use Lessons From the Mouse That We Roared At*, WASH. POST, Oct. 8, 1994, at F24 (summarizing public discussion of a Disney proposal for building a history theme park).

2. The commercial development had been pitched initially to Agoura Hills, California, but affluent residents objected to every location proposed by the developer. The reasons for the rejection were probably the same as those succinctly summed up by the court in *Quinton v. Edison Park Dev. Corp.*, 285 A.2d 5, 8 (N.J. 1971):

> They were undoubtedly aware, as most of us are, that large shopping centers have played a prominent part in the uglification of American communities. The centers have often brought with them intolerable traffic problems. And they have often been accompanied by disturbing noises, lights, fumes, and congestion, along with unreasonable hours and modes of operation.

3. *See* Village of Barrington Hills v. Village of Hoffman Estates, 410 N.E.2d 37 (Ill. 1980).

4. *See generally* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 430, 433 (1990) [hereinafter *Our Localism: Part II*].

5. *See id.* at 429. *See also* Town of Northville v. Village of Sheridan, 655 N.E.2d 22, 25

be cognizant of the potential competition between municipalities for commercial development.[6] A "slow-growth" municipality that drives too hard a bargain with a developer by seeking excessive exactions may find the developer lured to the neighboring town.[7] The neighboring town will receive the tax revenue[8] from a commercial development on a border location, while traffic congestion and safety concerns may be increased in the "slow-growth" municipality.[9] Thus, when community leaders consider development potential, their decisions may impact not only their own community, but may also affect neighboring ones as well.

Intergovernmental conflict[10] and competition between municipalities, created by the unequal distribution of benefits and burdens that may result from local decision making, can be addressed in a variety of ways that will be discussed in this Article. However, none of these approaches has been universally accepted in this country, largely due to the great deference given by courts and legislatures to the concept of local autonomy over land use decisions.[11] The primary municipalities affected in these disputes are suburbs.[12] Indeed, it has been noted that "[t]he suburb, not the city, is the principal form of urban settlement in the United States today."[13] The suburb is seen as the residential haven away from the glare of the big city lights where local government protects the home and family from undesirable influences.[14] Therefore, attempts to increase state or regional

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(Ill. App. Ct. 1994).

6. *Our Localism: Part II*, *supra* note 4, at 410, 443.

7. *See id.* at 410-12.

8. One common zoning objective is to increase the local property tax base "by zoning favorable to major new developments that will add substantially to the tax rolls." Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 409 (1994).

9. *See* Vicki Been, *"Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 512 (1991). The "antigrowth" policies of one municipality may also create benefits for neighboring municipalities in the form of increased housing prices due to increased housing demand in surrounding suburbs. *See* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 402-03 (1977).

10. For purposes of this Article, "intergovernmental conflict" refers only to conflict between municipalities. For a discussion of intergovernmental land use disputes between a city and the county or the state, see Laurie Reynolds, *The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing*, 71 MINN. L. REV. 611 (1987) and George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417 (1995).

11. *See Our Localism: Part II*, *supra* note 4, at 355 (suburbs are able to protect local resources and avoid urban economic or social problems because of "localist values of courts and legislatures"). *See also* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 24-58, 85-111 (1990) [hereinafter *Our Localism: Part I*].

12. *Our Localism: Part II*, *supra* note 4, at 348-49.

13. *Id.* at 348.

14. *See id.* at 382. "The essence of the suburban model is the association of local

control are viewed as antithetical to the treasured values of family life and generally have been unsuccessful.[15] Hence, this Article will focus upon disputes within the suburban context.

Part I of this Article discusses the litigation approach to addressing problems that arise when one municipality makes a land use decision regarding commercial development[16] that benefits its own citizens but negatively impacts its neighbors. This part includes the issues of standing, nuisance, breach of a general duty to consider the impact on neighboring municipalities, due process violations, and the adequacy of environmental impact reports. Part II explores annexation as a way to expand territorial jurisdiction without regionalism and resolve the conflicts that result from fragmentation of the metropolitan area. Part III considers the option of intergovernmental contracting as a mechanism to ensure the cooperation of neighbors in land use decision making and to promote the sharing of benefits and burdens created by commercial development in adjacent communities. Part IV observes the legislative solution of state or regional planning to deal with the external burdens created by local land use regulation. Part V concludes by proposing that municipalities be encouraged and required to share the benefits and burdens by internalizing the externalities of their local land use decisions through a combination of voluntary regional planning, an effective use of environmental impact reports, and binding arbitration.

I. LITIGATING A SOLUTION TO INTERGOVERNMENTAL CONFLICT

A. Standing

In order to use litigation to block a neighboring municipality's land use decision, the objecting citizen or municipality must have standing to assert a legal cause of action.[17] A nonresident plaintiff must demonstrate a particularized injury in order to obtain judicial review of local zoning practices.[18] This particularized injury requirement has been especially difficult to meet in exclusionary zoning cases where nonresident plaintiffs must cite specific housing projects blocked by local zoning practices in which they have been assured homes.[19] In the key

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government with the values of home and family." *Id.*

15. *See id.* at 382-84. "The frequent linkage of local government to home and family leads to a deferential or protective attitude toward local power and a reluctance to mandate state intervention in local arrangements." *Id.* at 382.

16. This Article does not address the issues of low-income housing, educational facilities, or locally undesirable land uses (LULUs).

17. *See* Warth v. Seldin, 422 U.S. 490, 499-500 (1975) (federal standing); Halfway House, Inc. v. City of Portland, 670 A.2d 1377, 1379 (Me. 1996); Society of the Plastics Indus., Inc. v. County of Suffolk, 573 N.E.2d 1034, 1038-44 (N.Y. 1991) (discussing problems of standing in great detail); Gwynedd Properties, Inc. v. Board of Supervisors, 635 A.2d 714, 716 (Pa. Commw. Ct. 1993).

18. *See Warth*, 422 U.S. at 508.

19. *See Our Localism: Part I*, *supra* note 11, at 107 (discussing *Warth*); *see also* Been,

exclusionary zoning case, *Warth v. Seldin*,[20] the Supreme Court upheld local legislative authority "to pursue local self-interest, without any duty to take into account the effects of local land use regulation on excluded nonresidents,"[21] and it "refused to take a regional perspective on local zoning practices."[22]

States such as Vermont and Florida, which have adopted a regional planning approach to land use decision making, also limit standing in cases involving land use decisions.[23] Standing is restricted by statute to landowners, developers, and state planning agencies because they are considered to be the appropriate entities to protect the public's regional and statewide interests.[24] Neighboring municipalities are denied standing because their interests are considered to be adequately protected by regional processes.[25] However, in New Jersey, courts "have historically taken a liberal approach to the issue of standing 'in land use planning as well as in other actions particularly where matters of public policy are at stake.'"[26]

Some jurisdictions have confronted the issue of standing for neighboring municipalities and have determined that "a municipality has standing to challenge the zoning ordinances of another municipality upon showing the existence of a real interest in the subject matter of the controversy."[27] It has been argued that giving plaintiffs standing in these cases "will invite chaos in the relationships

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supra note 9, at 505 n.151 (plaintiffs face "extraordinary difficulties . . . in establishing standing in exclusionary zoning cases.").

20. 422 U.S. 490 (1975).

21. *Our Localism: Part I*, *supra* note 11, at 109.

22. *Id.* at 107.

23. *See* James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes, in* 1995 ZONING AND PLANNING LAW HANDBOOK 449, 483-84 (Alan M. Forrest ed., 1995).

24. *See id.* (citing Friends of Everglades, Inc. v. Board of County Comm'rs, 456 So. 2d 904, 908, 909-10, 913-15 (Fla. Dist. Ct. App. 1984)).

25. *See id.*

26. Madin v. New Jersey Pinelands Comm'n, 492 A.2d 1034, 1046 (N.J. Super. Ct. App. Div. 1985) (quoting Dover Township v. Dover Township Bd. of Adjustment, 386 A.2d 421, 426 (N.J. Super. Ct. App. Div. 1978)) (municipality is "interested" or "aggrieved" party when private developers propose a major project in its territory); *see also* Hoboken Env't Comm., Inc. v. German Seaman's Mission, 391 A.2d 577, 581 (N.J. Super. Ct. Ch. Div. 1978) (state has adopted a liberal approach to standing in zoning and land use cases to allow citizens and taxpayers of municipalities to object to land uses which have "'a potential impact on the integrity of the zoning plan and the community welfare' even in the absence of individualized injury") (quoting Booth v. Board of Adjustment, 234 A.2d 681, 682 (N.J. 1967)).

27. Village of Barrington Hills v. Village of Hoffman Estates, 410 N.E.2d 37, 40 (Ill. 1980) (citing Borough of Cresskill v. Borough of Dumont, 104 A.2d 441, 444 (N.J. 1954)); *see also* Township of River Vale v. Town of Orangetown, 403 F.2d 684, 687 (2d Cir. 1968); Borough of Allendale v. Township Comm., 404 A.2d 50, 51 (N.J. Super. Ct. Law Div. 1979), *aff'd*, 426 A.2d 73 (N.J. Super. Ct. App. Div. 1991); Ruegg v. Board of County Comm'rs, 573 P.2d 740, 742 (Or. Ct. App. 1978).

between municipalities and flood the courts with zoning litigation."[28] However, courts retain control over litigation by requiring that plaintiff municipalities demonstrate "direct, substantial and adverse effects upon [them] in the performance of their corporate obligations" in order to show a real interest in the controversy.[29] When major suburban commercial development is involved, objecting plaintiffs must demonstrate that they are directly affected by the passage of the ordinance in their rights, duties, privileges, benefits, or legal relationships.[30] Increased competition caused by commercial development in a neighboring municipality will not be a sufficient basis on which to confer standing; neighboring plaintiffs must instead show that a more substantial injury, such as a decrease in property values, has been suffered.[31] Thus, the spectrum of standing requirements ranges from courts that allow only residents of a community to challenge municipal decisions to courts that allow neighboring municipalities to challenge zoning actions of another municipality. The effectiveness of using a litigation approach to resolve interlocal conflict will depend upon the jurisdiction's approach to standing and the degree of injury required to confer that standing.

B. Causes of Action: Nuisance and Breach of Duty

When suburban commercial development interferes with the use and enjoyment of neighboring land, common law nuisance is available as a potential cause of action for those individuals or entities harmed by the development. As a precursor to zoning, nuisance law provided the early basis for controlling land use by either excluding or controlling the location of undesirable activities.[32] Zoning was eventually accepted in this country as an appropriate mechanism for proactively controlling land use by regulating nuisance activities.[33] However, nuisance actions are still available as an "after-the-fact" type of land use regulation[34] and are not preempted by zoning.[35] Concepts of nuisance and harm

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28. *Village of Barrington Hills*, 410 N.E.2d at 40.

29. *Id.* (municipality alleged loss of municipal revenues due to diminution in property values, increased expenses for traffic control and litter cleanup, and degradation of air quality).

30. *See* Westgate Shopping Village v. City of Toledo, 639 N.E.2d 126, 129-31 (Ohio Ct. App. 1994).

31. *See* Nautilus of Exeter v. Town of Exeter, 656 A.2d 407, 408 (N.H. 1995) (increased competition is not sufficient to confer standing because it is a natural risk in the economy). *But cf. infra* notes 84-89 and accompanying text.

32. *See* DANIEL R. MANDELKER, LAND USE LAW §§ 4.02-4.15, at 100-13 (3d ed. 1993 & Supp. 1994) (discussing nuisance).

33. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926). Zoning is a valid extension of the police power of the state and will be held unconstitutional only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.* at 394.

34. *See* Ralph D. Rinaldi, *Virginia's Vested Property Rights Rule: Legal and Economic Considerations*, 2 GEO. MASON L. REV. 77, 105 n.57 (1994).

35. *See* Robert J. Shostak, *The Prosecution of a Water Case*, *in* EASTERN MINERAL LAW

have also been used for much of the Supreme Court jurisprudence involving regulatory takings.[36]

A municipality may be held liable for creating or maintaining a nuisance within its borders unless the state legislature provides otherwise.[37] A municipality is not exempt from nuisance liability on the ground that it was exercising governmental functions or powers, even when it is exempt from liability for negligence in performing such functions.[38] In *Village of Barrington Hills v. Village of Hoffman Estates,*[39] the municipalities of Barrington Hills and South Barrington filed a complaint against the municipality of Hoffman Estates, the real estate developer, the financing bank, and the landowners, challenging the construction of an open-air theater and the adoption of zoning ordinances relating to this commercial development.[40] The challenged ordinances rezoned a single-family residential area creating a central business district and a farming district.[41] The property rezoned was "located at a substantial distance from the residentially developed area of Hoffman Estates but [was] in close proximity to residentially developed areas within the corporate limits of Barrington Hills and South Barrington."[42] Therefore, the plaintiff municipalities were more severely impacted by the rezoning, in terms of location of the downgraded use, than the municipality which made the zoning decision. The plaintiff municipalities alleged three causes of action. First, they alleged that Hoffman Estates' rezoning actions denied them both Federal and State constitutional due process.[43] Second, they alleged that Hoffman Estates violated its own zoning ordinances by rezoning.[44] Finally, they alleged that the zoning ordinances which permitted the construction and operation of the theater constituted a public nuisance, entitling them to temporary and

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FOUNDATION, PROCEEDINGS OF THE 14TH ANNUAL INSTITUTE § 21.02[2][b] (Cyril J. Fox, Jr. ed., 1993).

36. *See* Been, *supra* note 9, at 488 n.78 (discussing nuisance as part of the takings jurisprudence despite Ronald Coase's view that "externalities are reciprocal: while it can be said that the developer imposes a cost upon the community by building a development that pollutes the ground water, it would be just as accurate to say that the community imposes a cost upon the developer by demanding that ground water remain unpolluted") (citing Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960)).

37. *See* Village of Lebanon v. Loop No. 175, 32 N.E.2d 458 (Ohio Ct. App. 1935). "[A] municipality, regardless of the kind of function it may be exercising, is liable in damages to one who has been injured by the commission of a nuisance by the municipality." *Id.* at 461 (quoting District of Columbia v. Totten, 5 F.2d 374, 377 (D.C. Cir. 1925)).

38. *See* Stanley v. City of Macon, 97 S.E.2d 330, 332 (Ga. Ct. App. 1957); Rodgers v. Kansas City, 327 S.W.2d 478, 484 (Kan. Ct. App. 1959); Windle v. City of Springfield, 8 S.W.2d 61, 62 (Mo. 1928).

39. 410 N.E.2d 37 (Ill. 1980).

40. *Id.* at 38.

41. *Id.* at 38-39.

42. *Id.* at 39.

43. *Id.*

44. *Id.*

injunctive relief.[45] Although the reported decision for this dispute was based upon the issue of whether the neighboring municipalities had standing to object to the ordinances,[46] this case illustrates the potential causes of action that can be asserted against a municipality that burdens its neighbors as a result of local zoning activities.

The concept of nuisance can be viewed as a duty not to interfere with the use and enjoyment of another's property.[47] The duty of one municipality not to interfere with neighboring municipalities as a result of the zoning process has also been expressed by some courts as a general proposition of law.[48] For example, in *Quinton v. Edison Park Development Corp.*,[49] plaintiffs residing in the neighboring municipality of Woodbridge sued the municipality of Edison, objecting to the granting of a permit to build and operate a large shopping center in a residential area.[50] The plans for the shopping center provided for a 100-foot buffer strip between the facility and the residential section of Edison, but did not provide for a similar strip to protect Woodbridge residents.[51] The court in *Quinton* concluded that Woodbridge residents were entitled to the same treatment as Edison residents in zoning decisions made by Edison.[52] This conclusion was based upon New Jersey cases that "have long recognized the duty of municipal officials to look beyond municipal lines in the discharge of their zoning responsibilities."[53]

New Jersey, both legislatively[54] and judicially, has recognized "that local zoning authorities should look beyond their own provincial needs to regional requirements."[55] New Jersey municipalities then, at the very least, owe a duty to hear residents of neighboring municipalities who may be adversely affected by

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45. *Id.*

46. *Id.* at 40 (holding that neighboring municipalities have standing to assert a complaint against the municipality enacting the challenged zoning ordinances).

47. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 87, at 619 (5th ed. 1984).

48. *See* Save a Valuable Env't v. City of Bothell, 576 P.2d 401 (Wash. 1978) (striking down rezoning to allow development of a regional shopping center because of impact outside the community boundaries); *see also* Quinton v. Edison Park Dev. Corp., 285 A.2d 5, 7 (N.J. 1971); Borough of Cresskill v. Borough of Dumont, 104 A.2d 441, 445-46 (N.J. 1954).

49. 285 A.2d 5 (N.J. 1971).

50. *Id.* at 6-7. Other parties were involved in the suit as well, including residents of Edison Heights, the builder, and the lessee/operator of the shopping center. *See id.*

51. *Id.*

52. *Id.* at 9 ("If a buffer strip is reasonably required for the protection of the Edison residents it is reasonably required for the protection of the Woodbridge residents who justly claim equal treatment.").

53. *Id.* at 8-9 (citing Kunzler v. Hoffman, 225 A.2d 321 (N.J. 1966); Barone v. Township of Bridgewater, 212 A.2d 129 (N.J. 1965); Borough of Cresskill v. Borough of Dumont, 104 A.2d 441 (N.J. 1954); Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 64 A.2d 347 (N.J. 1949)).

54. *See, e.g.*, N.J. STAT. ANN. §§ 40:55D-84 to D-87 (West 1991).

55. *Quinton*, 285 A.2d at 9 (quoting *Kunzler*, 225 A.2d at 326).

proposed zoning changes.[56] "To do less would be to make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning."[57] This principle of regional duty culminated in the leading case on exclusionary zoning, *Southern Burlington County NAACP v. Township of Mount Laurel*[58] where the court commanded "developing municipalities in the state [to] consider regional housing needs."[59]

The obligation of a municipality to consider the general welfare of citizens both inside and outside municipal boundaries was clarified by the Supreme Court of New Hampshire in *Britton v. Town of Chester*:[60]

> The possibility that a municipality might be obligated to consider the needs of the regions outside its boundaries was addressed early on in our land use jurisprudence by the United States Supreme Court, paving the way for the term "community" to be used in the broader sense. In *Village of Euclid v. Ambler Realty Co.*, the Court recognized "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." When an ordinance will have an impact beyond the boundaries of the municipality, the welfare of the entire affected region must be considered in determining the ordinance's validity.[61]

Although some state courts have required local governments to consider regional needs when regulating land uses, these same courts have encouraged their state legislatures to take a more active role in land use regulation and local zoning and have disavowed judicial participation in regional planning.[62] Nevertheless, this judicial acknowledgment of a municipal duty to consider the welfare of residents outside municipal lines may be used as support for legislative efforts to adopt regional or statewide planning programs.[63] State or regional planning and regulation is certainly an alternative approach to resolving intergovernmental conflict in advance of litigation. However, as discussed in Part IV of this Article,

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56. *See Borough of Cresskill*, 104 A.2d at 445-46.

57. *Id.* at 446.

58. 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel II*].

59. Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 973 (1976) (citing *Mount Laurel II*, 336 A.2d at 727-28, 732-33).

60. 595 A.2d 492 (N.H. 1991).

61. *Id.* at 495 (citation omitted), *quoted in* STATE & REGIONAL COMPREHENSIVE PLANNING 232-33 (Peter A. Buchsbaum & Larry J. Smith eds., 1993) [hereinafter STATE & REGIONAL PLANNING]. *See* Associated Home Builders v. City of Livermore, 557 P.2d 473, 487 (Cal. 1976); *see also* Berenson v. Town of New Castle, 341 N.E.2d 236, 242-43 (N.Y. 1975).

62. *See Our Localism: Part I*, *supra* note 11, at 43-44 (discussing state court exclusionary zoning cases in Pennsylvania, California, New Jersey, and New York).

63. *See* STATE & REGIONAL PLANNING, *supra* note 61, at 232-33 (discussing Texas' recognition of the obligation of municipalities to consider the general welfare of residents both inside and outside their boundaries).

a regional or statewide planning approach has its drawbacks and local control has generally been preferred and retained.[64]

C. Cause of Action: Violation of Due Process

When a landowner believes that the use of his or her property has been more severely limited than similarly situated landowners, he or she may challenge the restriction as a violation of Fourteenth Amendment Due Process rights.[65] Courts have also been willing to consider zoning challenges by municipalities on Fourteenth Amendment grounds, using "reasonableness" as the constitutional standard that zoning officials must meet.[66]

In *Township of River Vale v. Town of Orangetown*,[67] the municipality of River Vale sued the neighboring town of Orangetown, which had rezoned an area bordering River Vale from a residential district to an "office park" district.[68] River Vale alleged that its property "has been and will be depreciated in value without due process of law" as a result of Orangetown's rezoning actions.[69] The court supported River Vale's right to assert a claim that "the zoning ordinance arbitrarily diminished the value of plaintiff's land"[70] and was therefore unconstitutional as "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[71] The court rejected defendant's claim that a Fourteenth Amendment challenge could only be brought by a resident of the plaintiff municipality.[72] River Vale was allowed to sue a neighboring municipality for a due process violation as a "person" entitled to protection within the meaning of the Fourteenth Amendment.[73] Thus, either a municipality or a resident can assert a cause of action for a due process violation when a neighboring

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64. *See* discussion *infra* Parts IV, V.A.

65. *See* Mandelker, *supra* note 59, at 909 (requirement that zoning be "in accordance" with comprehensive plan serves as the basis for requiring that a zoning classification "be justified by policies applicable to the whole community" in order to pass constitutional muster). *See also* Westgate Shopping Village v. City of Toledo, 639 N.E.2d 126, 128 (Ohio Ct. App. 1994) (shopping center filed claim that ordinance was "unconstitutional, unreasonable, arbitrary, contrary to law, and not supported by a preponderance of substantial, reliable and probative evidence" because it permitted a competitive shopping mall to expand its operation).

66. *See* Township of River Vale v. Town of Orangetown, 403 F.2d 684, 686 (2d Cir. 1968) (discussing Supreme Court standard of review for local zoning ordinances).

67. *Id.*

68. *Id.* at 685.

69. *Id.*

70. *Id.* at 686.

71. *Id.*

72. *Id.* (finding that cases cited by defendant involved municipalities suing the state which created them, not municipalities suing other municipalities).

73. *Id. But see* Town of Northville v. Village of Sheridan, 655 N.E.2d 22, 24 (Ill. App. Ct. 1994) ("[A] municipality does not have due process or equal protection rights which can be protected.").

municipality makes a land use decision which unreasonably impacts nonresidents.

D. Cause of Action: Adequacy of the Environmental Impact Statement

Actions taken by federal agencies are guided by the National Environmental Policy Act of 1969 (NEPA),[74] which may require the inclusion of a detailed statement of the environmental impact of the proposed action in its decision-making process.[75] This detailed statement, commonly called an environmental impact statement (EIS), is required "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[76] At least fifteen states have enacted legislation modeled after NEPA; this legislation requires state and local agencies to take environmental impact into account in their decision-making process whenever necessary to protect the quality of the environment.[77]

In the states that have enacted programs similar to NEPA, before issuing a conditional use or building permit, a municipality may be required to prepare an environmental impact report if the proposed project "may have a significant effect on the environment."[78] The existence of a NEPA-type program at the state level is typically intended "to ensure that governmental entities in their regulatory function [will] determine that private individuals [are] not forsaking ecological cognizance in pursuit of economic advantage."[79] Private activity that adversely affects the environment may be subject to government agency regulation through the granting or denial of a permit.[80] Hence, local residents who object to certain land use decisions may challenge the EIS process in order to stop, or at least limit, an unpopular project.[81]

Citizens who oppose major land use projects have used the environmental impact review process as an effective check on these projects, even though they

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74. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4331-4347 (1994 & Supp. I 1995)).

75. *See* WILLIAM H. RODGERS, ENVIRONMENTAL LAW, § 9.1, at 801-03 (2d ed. 1994) (discussing sections 101 and 102 of NEPA).

76. *Id.* at 803 (citing subsection 102(2)(c) of NEPA).

77. *See* DANIEL MANDELKER, NEPA LAW AND LITIGATION §§ 13-14 (2d ed. 1994); *see, e.g.*, California Environmental Quality Act of 1970 (CEQA), ch. 1433, 1970 Cal. Stat. 2780 (codified as amended at CAL. PUB. RES. CODE §§ 21000-21177 (West 1996 & Supp. 1997) (requiring that environmental impact report (EIR) be prepared if local or state governmental action may have a significant impact on the environment)).

78. *See, e.g.*, Friends of Mammoth v. Board of Supervisors of Mono County, 502 P.2d 1049, 1059 (1972) (holding that CEQA requires preparation of "an environmental impact report prior to the decision to grant the conditional use and building permits").

79. *Id.* at 1055.

80. *Id.*

81. *See* RODGERS, *supra* note 75, § 9.1, at 818 ("The typical claims, overwhelmingly, are: failure to prepare an EIS and inadequacy of the EIS.").

do not have the authority to influence the approval process.[82] For example, a group of approximately twenty residents of Bishop, California was able to delay the construction of a proposed shopping center for at least three years by challenging the environmental impact review process.[83] Bishop residents were concerned that the new shopping center would adversely affect the downtown shopping area by taking away business from these establishments, resulting in an "eventual physical deterioration of downtown Bishop." [84] The proposed shopping center project required actions by the Inyo County Board of Supervisors to amend the Bishop general plan, to rezone, and to approve a tract map, road abandonment, and variance. These actions were approved in December 1983 and March 1984 and litigation began thereafter with a claim for failure to conduct an adequate environmental review.[85] The plaintiffs' application for a writ of mandate was judicially resolved finally in September 1985, when the court directed the county to set aside its actions based on a finding that "the lead agency never considered whether the environmental effects of the total shopping center project, properly defined, were significantly adverse and thus required an EIR."[86] The local government unit was required to "begin the environmental review process anew"[87] and to include an analysis of socioeconomic impacts, such as "whether the proposed shopping center [would] take business away from the downtown shopping area."[88]

Other municipalities have used the environmental review process as a way of controlling the socioeconomic impact of land use actions taken by their neighbors.

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82. *See* Wickersham, *supra* note 23, at 487-88 (discussing use of environmental review process as a means of citizen control, including "abuse of environmental regulations for exclusionary purposes"); *see also* Matt Assad, *Northampton Councilwoman Wants Impact Study on Ballpark*, MORNING CALL, July 1, 1994, at B6 (discussing baseball committee's concern that requiring an environmental impact study could delay or prevent acquisition of financing to facilitate bringing a baseball team into the area).

83. *See* Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo, 217 Cal. Rptr. 893 (Cal. Ct. App. 1985).

84. *Id.* at 904.

85. *Id.* at 895.

86. *Id.* at 903.

87. *Id.* at 907.

88. *Id.* at 904. Socioeconomic impacts must be considered in a municipality's decision whether or not an EIS needs to be prepared. *See* Marin Mun. Water Dist. v. KG Land Cal. Corp., 1 Cal. Rptr. 2d 767, 773 (Cal. Ct. App. 1991) (explaining that social and economic changes that result from a project are not treated as significant environmental effects, but that such effects "may have some relevance in determining the significance of a physical change"); Real Estate Bd. v. City of New York, 556 N.Y.S.2d 853, 854 (App. Div. 1990) (environmental impact statement was adequate because it "carefully examined whether the [rezoning] proposal would result in the displacement of local residents and businesses"); Mary F. Pols, *City Tackles Adventist Development*, L.A. TIMES (Ventura County Edition), Dec. 13, 1995, at B1 (City's environmental review of proposed commercial project recommended denial of project and identified problem that "existing businesses would suffer revenue losses if the commercial center is built.").

Recently, the City of Oxnard, California, challenged the approval of a new shopping mall in the neighboring City of Ventura using the environmental review process as a basis for litigation.[89] Discord between the neighboring municipalities in this area is not new.[90] Ventura and another neighboring community, Camarillo, objected to Oxnard's approval of a large shopping center in 1995, claiming that it would affect traffic in the entire area and that "Oxnard's environmental analysis of the project understated the amount of traffic" that would travel though the area.[91] A commercial shopping center had been proposed in the mid-1980s and was halted, largely due to a lawsuit filed by Ventura in 1985 which claimed that the project would cause traffic problems affecting Ventura.[92] When Ventura decided to expand a local shopping center, Oxnard proposed that the cities join together to develop a regional shopping center located in Oxnard and share the sales-tax revenue.[93] Ventura officials rejected Oxnard's proposal stating that any compromise should have been negotiated "a long time ago" and that Oxnard's complaint that its economy would be hurt was "of little concern to Ventura."[94] Unfortunately, the neighboring cities' failure to work together on such a regional issue may result in a delay in the project that will "kill it outright" with no benefit to either city.[95]

Although litigation based on the environmental impact review process may be a successful mechanism to delay or even thwart a commercial development project in a neighboring municipality, the environmental impact statement itself can, instead, serve as a baseline for negotiations between municipalities that wish to share some of the benefits and burdens of their land use decisions. Impact studies that identify areas of anticipated traffic increases or additional safety requirements can serve as a basis for compromise between municipalities where regional

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89. Tracy Wilson & Eric Wahlgren, *Mall Foes File Voter Petitions and Lawsuit*, L.A. TIMES, Feb. 29, 1996, at B1 (Oxnard officials file suit contending that environmental documents failed to analyze project's economic impact on Oxnard.).

90. Miguel Bustillo & Constance Sommer, *Two Cities' Tug of War Grows Revenues: Economic Concerns Intensify Discord Between Oxnard and Ventura, Which Vie for Development*, L.A. TIMES, Mar. 5, 1995, at B1 ("[R]ivalry between Oxnard and Ventura is intensifying, as dwindling funds, growing urban ills and the rise of eastern Ventura County have pitted the two cities against each other in a tug of war over money, prestige and political pull.").

91. Miguel Bustillo, *Panel Oks Shopping Center Along Freeway*, L.A. TIMES, Mar. 18, 1995, at B1.

92. Miguel Bustillo & Tracy Wilson, *Oxnard Offers Joint Mall Plan*, L.A. TIMES, Dec. 9, 1995, at B1.

93. *Id.*

94. Tracy Wilson, *Ventura Rejects Plea to Change Mall Plans*, L.A. TIMES, Dec. 12, 1995, at B1. One Ventura councilman stated, "Oxnard has made its own bed and is now going to have to sleep in it." *Id.*

95. Wilson & Wahlgren, *supra* note 89, at B1 (Greater Oxnard Economic Development Corporation president states, "[I]t is truly unfortunate because if the two cities go against each other, it is really a zero-sum game.").

benefits and impacts will result from proposed commercial development.[96]

II. ANNEXATION

Central city annexation of surrounding areas has been one approach to resolving the problem of how to share the benefits and burdens of urban growth.[97] Annexation is the process by which one municipality expands its territorial reach by incorporating adjacent areas into its legal boundaries.[98] Restrictions on this process of annexation are defined by annexation legislation, which has changed significantly over the past fifty years.[99] Current annexation legislation generally requires the consent of local residents. This requirement, in conjunction with the ease of municipal incorporation, has resulted in "the multiplicity of autonomous, economically and socially differentiated local governments in most metropolitan areas."[100]

Annexation allows the absorption of suburban areas into a larger city so that a central city can increase its tax base and support the inner city infrastructure.[101] Theoretically, this process can be used to resolve a multitude of problems confronting residents of a metropolitan area that would potentially result in intergovernmental conflict. Central cities lacking the resources to tackle problems such as crime, pollution, lack of adequate housing, and transportation can expand their territorial boundaries to control spill-over effects into surrounding areas by dealing directly with these problems that are not contained by artificial boundaries.[102] Ohio's annexation legislation, for example, makes annexation procedurally easy and encourages the growth of existing cities.[103] However, annexation requires the consent of both the acquiring municipality and the territory sought to be annexed.[104] The commencement of annexation proceedings generally results in a lengthy struggle between the municipality, which needs an infusion of economic growth, and the neighboring suburb, which wants to keep its strong tax base and local autonomy.[105]

Initially, suburban residents were attracted to the concept of annexation because of the quality services offered by the urban infrastructure.[106] However, as

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96. *See infra* notes 217-21 and accompanying text.

97. *See* Johnstone, *supra* note 8, at 441.

98. *See Our Localism: Part I*, *supra* note 11, at 78 n.326.

99. *See Our Localism: Part II*, *supra* note 4, at 358-63.

100. *Our Localism: Part I*, *supra* note 11, at 81.

101. *See Our Localism: Part II*, *supra* note 4, at 363-64.

102. *See* Mary Shannon Place, Note, *Municipal Annexation in Ohio: Putting An End to the Bitter Battle*, 41 CLEV. ST. L. REV. 345, 346-48 (1993) (advocating municipal annexation as a possible solution to regional problems in urban areas).

103. *See id.* at 354.

104. *See id.* at 348 (citing OHIO REV. CODE ANN. § 709.033 (Anderson 1991)).

105. *See id.* at 362. The Note proposes negotiation and mediation as a solution to these annexation disputes in Ohio. *Id.* at 366-80.

106. *See Our Localism: Part II*, *supra* note 4, at 365, 374 & n.125 (discussing disincentives

the suburban areas became wealthier, the desire to avoid urban taxes, as well as urban problems such as an aging infrastructure, pollution, poverty and crime, encouraged suburban dwellers to choose local incorporation rather than annexation.[107] In addition, new state laws have allowed suburbs to combine for the purpose of funding infrastructure without losing local autonomy, have authorized intergovernmental contract for services, and have provided state financial assistance.[108] Therefore, as a current approach to resolving regional conflicts, annexation has only been effective in a few places and is generally not a feasible option because of strong suburban opposition.[109]

III. CONTRACTING A SOLUTION TO INTERGOVERNMENTAL CONFLICT

In most states, municipalities may contract with each other to obtain services such as law enforcement, administrative services, sewers and water supply, and parks and recreation.[110] This allows municipalities to take advantage of economies of scale and to avoid fixed costs and the unnecessary duplication of the service systems which can easily be extended to surrounding suburbs.[111] The contractual relationship between municipalities is an alternative to regional control over the provision of public goods and services or the fragmentation and duplication of efforts at local levels.[112] The providing municipality gains financial support from the adjacent community and the purchasing municipality retains local control while receiving the benefits of an existing service structure.[113]

Although contracts between municipalities for the provision of services are not uncommon and are generally enforceable,[114] interlocal agreements providing for

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to suburban independence because "major cities were the first localities to create professional police and fire departments, develop extensive school systems, pave streets, sidewalks and roads, create parks and invest in the costly public works necessary to provide water, power and sewage and waste removal").

107. *See id.* at 365-66.

108. *See id.* at 375-81 (discussing these new state laws in detail).

109. *See* Johnstone, *supra* note 8, at 441.

110. *See Our Localism: Part II*, *supra* note 4, at 377-78; *see also* Michael E. Libonati, *The Law of Intergovernmental Relations: IVHS Opportunities and Constraints*, 22 TRANSP. L. J. 225, 241 (1994) ("Forty-two states have enabling legislation or a constitutional provision authorizing cooperative intergovernmental service agreements.").

111. *See Our Localism: Part II*, *supra* note 4, at 378.

112. *See id.* at 379-80.

113. *See id.* at 378-79 (noting that such contracting is an alternative to annexation, which will likely be rejected by the outlying area if such interlocal contracting is available).

114. *See, e.g.*, City of Los Angeles v. City of Artesia, 140 Cal. Rptr. 684, 686 (Cal. Ct. App. 1977) (adjudicating dispute over amounts to be paid by cities contracting with county, which has provided police protection services to numerous cities within county limits since 1954); Durango Transp., Inc. v. City of Durango, 824 P.2d 48, 49 (Colo. Ct. App. 1991) (holding that intergovernmental agreement between city and county for mass transit system operation is valid); Nations v. Downtown Dev. Auth., 345 S.E.2d 581, 584 (Ga. 1986) ("pledge of municipal taxing

payments "as compensation for spillovers or to ameliorate wealth differences [between communities] are virtually unknown."[115] Such payments could be used to improve transportation infrastructure or provide more parks or greenways as buffers against commercial development. However, contracting between municipalities for purposes other than providing standard municipal services such as law enforcement and water supply has not occurred, either because local governments are reluctant "to cooperate over issues with lifestyle implications, for example subsidized housing,"[116] or because such contracts would be unenforceable under the legal constraints on governmental contracts.[117] The legal constraint that is most likely to be implicated in the enforcement of intermunicipal contracts is the requirement that a municipality not bargain away its police power or "unduly bind successive legislative bodies by preventing them from exercising their essential powers."[118] Under this "reserved powers" doctrine,[119] also referred to as the "inalienable power" doctrine,[120] a municipality is barred from relinquishing control over its police power, that is, the power to promote the public health, safety, and welfare.[121]

The application of these sovereign power doctrines potentially constrains the enforcement of municipal contracts and creates a dilemma for the courts. On one hand, public policy dictates that our expectation that contracts will be performed must be supported in order to maintain a viable economic society.[122] On the other hand, a basic principle of our democratic society is that "the powers granted to the

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power is permissible under the intergovernmental contracts clause"); City of Racine v. Town of Mount Pleasant, 213 N.W.2d 60, 64 (Wis. 1973) (City, in agreeing to supply sewer treatment, is not acting as a public service system or utility with the town, but is instead acting under an agreement permitted by legislation allowing contracts between municipalities for receipt or furnishing of services.). *See also* Timothy D. Hall, Annotation, *Right of One Governmental Subdivision to Sue Another Such Subdivision for Damages*, 11 A.L.R. 5TH 630 (1993).

115. *Our Localism: Part II*, *supra* note 4, at 432-33.

116. *Id.* at 378 & n.143 (discussing fact that there are few interlocal agreements to provide services with social implications, as illustrated by Cleveland suburbs refusing to agree with the regional housing authority to accept subsidized housing units within their communities).

117. *See generally* Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990) (primary focus of Article is whether municipalities are bound by their contracts).

118. *Id.* at 281-82 (discussing four legal challenges that can be made to governmental contracts). *See also* City of Glendale v. Los Angeles Superior Court, 23 Cal. Rptr. 2d 305, 312 (Cal. Ct. App. 1993) (holding city could not contract away power of eminent domain).

119. United States v. Winstar Corp., 116 S. Ct. 2432, 2454 (1996) (explaining the development of the unmistakability doctrine as a response to allowing state legislatures to bind their successors by entering into contracts protected by the Contract Clause and defining the "reserved powers" doctrine as holding that certain substantive powers of sovereignty can not be contracted away).

120. Griffith, *supra* note 117, at 283.

121. *See id.* at 282.

122. *See id.* at 283.

government come from the people and remain with the government unless withdrawn by the people."[123] As a result of this dilemma, various judicial tests have been developed over time to resolve the conflict as to whether an intermunicipal contract should be enforced. These tests include: distinguishing between government functions that are proprietary (acting as a private party) versus governmental;[124] examining the contract's subject matter or the parties' contractual functions;[125] and other policy-based tests that look at various factors such as fairness, reasonableness, advantage to the municipality, and impairment of municipal discretion.[126] These tests for enforceability are applied both to contracts between municipalities and to contracts between municipalities and private parties.[127] Therefore, in order to ensure enforceability, contracts between municipalities should be entered into in good faith pursuant to the municipality's basic legal structure, the contract should allow each municipality to receive some benefit that outweighs its loss of control, and the continuing performance of the contract should not result in substantial harm to residents of either of the contracting municipalities.[128]

Intergovernmental contracting for the provision of standard municipal services is a valuable capability for reasons discussed above, and is generally enforceable despite a "reserved powers" doctrine challenge.[129] However, these service contracts do not require adjacent municipalities to take externalities into account when they make land use decisions that are beneficial to their communities, but that negatively impact surrounding suburbs. The intergovernmental contracting needed to resolve conflicts created by suburban commercial development must involve either promises to share the benefits and burdens of land use decisions that affect more than one municipality or promises to develop and then follow local land use plans which will avoid interlocal conflict.

The development and implementation of local general plans can serve as a basis for intergovernmental contracting and cooperation.[130] If local land use

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123. *Id.* at 283-84.

124. *See id.* at 284 (This governmental/proprietary test has been replaced in many jurisdictions by the function test.).

125. *See id.* (The function test has been used to find that the municipality's sovereign powers include its power to tax, its police power, and its power of eminent domain.).

126. *See id.* at 285. At the end of her article, Professor Griffith proposes her own five-part test to replace this patchwork of judicial analysis techniques. *Id.* at 348.

127. *See id.* at 364 & n.399 (discussing application of proposed five standards to contracts among public entities).

128. *See id.* at 364-65 (applying proposed five-standard test of enforceability to contracts between local governmental units).

129. *See* United States v. Winstar Corp., 116 S. Ct. 2432, 2457 (1996) (discussing analogous U.S. government supply contracts, such as buying food for the army, the Court stated that "no one would seriously contend that enforcement of humdrum supply contracts might be subject to the unmistakability doctrine[,]" which is a contractual restraint on regulatory powers in addition to the "reserved powers" doctrine).

130. *See, e.g.*, Marin Mun. Water Dist. v. KG Land Cal. Corp., 1 Cal. Rptr. 2d 767, 777 (Cal.

decisions must adhere to a general plan, one option would be to encourage neighboring municipalities to cooperate with each other in the development of local plans, allowing them to agree that these plans will be implemented and will not be amended without mutual consent. However, several difficulties exist with this approach to controlling the problem of intergovernmental conflict.

First, neighboring localities must have an incentive to cooperate in the development of local plans. Unless the state legislature requires regional coordination of land use decision making, the localities must view the process as a valuable, mutually beneficial arrangement. If the localities are not equal in terms of wealth and attractiveness to current residents and newcomers, then it is doubtful that mutual advantage will serve as an incentive for regional cooperation. The less desirable community will not likely have sufficient revenue to bargain with its wealthier neighbors. However, it is always possible that the wealthier neighbors may be willing to pay to prevent the less desirable community from approving undesirable commercial development that will have detrimental impacts beyond its borders.

The second major difficulty, assuming municipalities will cooperate in local plan development, is the lack of binding authority of the planning process over land use decision making. Historically, local comprehensive planning was not necessarily viewed as a prerequisite to land use regulation and decisions.[131] Although planning proponents have encouraged the adoption of mandatory local comprehensive planning,[132] land use decisions that are inconsistent with the local plan can be executed by simply amending the general plan.[133]

Finally, even if municipalities promise not to amend the plan, such a promise will likely run afoul of the "reserved powers" doctrine as a bargaining away of police power and a binding of successive legislative bodies to prevent them from exercising their power to amend the local plan.[134] If the municipality does amend its plan in breach of a contract with a neighboring municipality, such regulatory action could be challenged as an unconstitutional impairment of contract.[135]

Ct. App. 1991) (EIR must discuss any inconsistencies between proposed project and general and regional plans); City of Portland v. City of Beaverton, 886 P.2d 1084, 1085 (Or. Ct. App. 1994) (upholding Oregon's Land Use Board of Appeals remand of City of Beaverton and Washington County's amendment of their comprehensive plans because the amendments conflicted with Portland's unamended comprehensive plan, and the two jurisdictions were not allowed to unilaterally alter the land use planning status quo).

131. *See* Mandelker, *supra* note 59, at 900-09.

132. *See, e.g., id.* at 910.

133. *See* MANDELKER, *supra* note 32, § 6.34, at 256-57 (discussing spot planning).

134. It is possible to make an argument, based on *Winstar Corp.*, 116 S. Ct. at 2461-62, that such an agreement not to amend the plan does not thwart the use of sovereign power, but only indirectly deters the regulatory action by raising its costs to include breach of contract remedies.

135. The Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1. Because the local exercise of police power has been delegated by the state, any local regulation will potentially be implicated if it impairs a contractual relationship. *See* Judith Welch Wegner, *Moving Toward the Bargaining Table:*

Tax-base sharing among municipalities[136] is one way to manage the inequality problem created when wealthy people escape the urban areas by moving into outlying suburbs in order to maintain a higher quality of life.[137] Inner cities cannot survive if the needed tax base is built outside the cities and revenues are not redistributed based upon need.[138] Contracts between local governments could allow metropolitan areas to share tax-base gains and offset regional burdens created by local land use decisions. However, state legislatures may have to rewrite laws dealing with intergovernmental contracts in order to allow such tax-base sharing agreements to be enforceable under current sovereign powers doctrine.[139] If annexation laws are also revised, one incentive available to an urban city is to agree with surrounding suburbs that the city will not annex the outlying areas, in return for the suburbs' promise to share their tax base.[140] Minnesota has already enacted legislation to require tax-base sharing among municipalities in the Minneapolis-St. Paul area.[141] Local areas that are realizing "above-average industrial and commercial property tax growth [are required] to share a percentage of the increment with other localities, with the size of the interlocal payments turning on the population and needs of the recipients."[142] Although Minnesota's tax-base sharing is an interesting approach to resolving the growing gap between the urban and suburban quality of life that has been created by urban sprawl, the contractual approach proposed in Part V encourages tax-base sharing based upon quantifiable externalities that result from one municipality's land use decision.[143]

Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals, 65 N.C. L. REV. 957, 962-77 (1987) (discussing in detail the "theoretical framework [governing] public-private land use deals"). *See also* Royal Liquor Mart, Inc. v. City of Rockford, 479 N.E.2d 485, 493-94 (Ill. App. Ct. 1985) (holding that referendum to invalidate a sales tax would constitute an impairment, under the Contract Clause, of the contractual relationship between the city and the Metro Authority to enact the sales tax).

However, where a municipality purports to contract away its police power (as it would be doing if it promised not to amend its plan) that provision could be found void ab initio. There could then be no Contract Clause violation because no obligation ever existed. *See* Chemical Bank v. Washington Pub. Power Supply Sys., 691 P.2d 524, 545 (Wash. 1984) (en banc).

136. *See* Matt Pommer, *Lobbyist Sees Drastic Changes Coming For Cities*, CAPITAL TIMES, (Madison, Wisconsin), Oct. 10, 1994, at 3A. ("Tax-base sharing is a concept by which a particular municipal area pools revenues from the growth in values into a pot and it is redistributed based on need.").

137. *See id.* (citing interview with executive director of the Alliance of Cities in Wisconsin).

138. *See id.*

139. *See id.*

140. *See id.*

141. *See Our Localism: Part II*, *supra* note 4, at 449 (discussing the Minnesota Metropolitan Fiscal Disparities Act, ch. 24, 1971 Minn. Laws 2286 (1971) (codified as amended at MINN. STAT. ANN. §§ 473F.01 to .13 (West 1994 & Supp. 1997))).

142. *Id.*

143. *See infra* notes 215-21 and accompanying text (discussing tax-base sharing according to environmental impact report).

IV. STATE AND REGIONAL PLANNING: THE IDEAL, BUT PERHAPS, UNATTAINABLE, SOLUTION TO LOCAL CONFLICT

Municipalities have no inherent power to control land use within their borders; they only have those powers which have been delegated to them by the state legislature.[144] The state holds the power to regulate land use as part of its general police power.[145] Although states have freely delegated this power,[146] commentators since the 1800s have endorsed the concept that cities should be subject to state authority and strict judicial review in order to ensure that municipalities act for the public good and avoid the abuse of power by local private interests.[147] However, contrary to these views about the lack of local power,[148] cities have not been powerless in the area of local land use control as a result of state authority.[149] In fact, "[l]ocalism as a value is deeply embedded in the American legal and political culture."[150] Therefore, any time the state legislature has attempted to review or rescind its grant of local power, the "structures of local control and the traditional commitment to local land use autonomy" have been retained.[151]

Local governments in metropolitan areas often make land use decisions which have spillover effects on surrounding jurisdictions.[152] In fact, local power issues typically find local governments at odds with each other, rather than with the

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144. *See* Gerald E. Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980) (citing 1 CHESTER JAMES ANTIEAU, MUNICIPAL CORPORATION LAW § 2.00 (1979)). The power to legislate with respect to local issues is referred to as the concept of "home rule" and may be the result of either state legislation or a state constitutional amendment. *Our Localism: Part I*, *supra* note 11, at 10-11.

145. *See* Wickersham, *supra* note 23, at 465 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926)).

146. *See id.* at 453 ("By 1930, forty-seven of the forty-eight states had zoning enabling acts" that transferred the power of land use regulation to local authorities.).

147. *See* Frug, *supra* note 144, at 1109-15 (discussing JOHN DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1st ed., Chicago, Cockcroft 1872) and EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 4.82, at 137 (3d rev. ed. 1979)).

148. *See id.* at 1078 (The "specific purpose of this Article is to discuss why cities can exercise only certain powers and how this powerlessness has affected their role in society."); *see also Our Localism: Part I*, *supra* note 11, at 11 ("According to Professor Frug and other scholars, these state constitutional measures have failed to protect or empower localities.").

149. *See* Wickersham, *supra* note 23, at 465 (Until the passage of state growth management statutes in the 1970s, "states had exercised virtually no oversight of local zoning."); *see also Our Localism: Part I*, *supra* note 11, at 1 ("Most local governments in this country are far from legally powerless.").

150. *Our Localism: Part I*, *supra* note 11, at 1.

151. *Id.* at 64-65 (discussing attempts at increased state participation in land use regulation to address regional issues).

152. *See id.* at 14 (Interlocal conflicts from local spillovers may require state intervention.).

state.[153] The nature of the suburb, the dominant form of urban community,[154] is such that local governments within the suburban area are just "fragments of larger, economically interdependent regions."[155] Therefore, legislative and judicial attempts to promote the concept of "localism,"[156] that is, greater local self-determination by local government units, has resulted in externalities from local actions affecting people outside local boundaries and regional inequalities in education, housing and employment opportunities.[157] Returning power from local governments to the state level to allow a regional approach to local problems and development may be the only effective way to eliminate interlocal differences in wealth and conflicts over externally-generated burdens.[158]

Initial legislative attempts to regionalize land use decision making were aimed at protecting sensitive environmental resources, not limited by artificial municipal boundaries,[159] and controlling "developments of regional impact (DRIs)."[160] States sought to protect critical areas from development that could yield a local increase in jobs and the tax base, but result in statewide environmental losses.[161] These efforts to increase state involvement in land use planning and regulation were collectively termed the "quiet revolution in land use control" and scholars predicted an eventual shift from local to state land use control.[162] This shift in responsibility from local to state control has not yet occurred as predicted, though some scholars continue to see a trend in growth management programs toward greater state intervention in the local planning and implementation process.[163] Although states such as Oregon and Florida have enacted strong regional land use legislation,[164] most state land use legislation has left local autonomy intact by making regional planning and control optional or purely advisory.[165]

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153. *See id.* at 3 (Typical impression about conflict in local government law is that it exists between state and local power, but instead such conflict generally involves local governments pitted against each other.).

154. *See id.* at 4.

155. *Id.* at 5.

156. *Id.* at 1 (The term, "localism," as used in this Article refers to the use of greater local power for purposes of "economic efficiency, education for public life and popular political empowerment.").

157. *See id.* at 4-5. This Article only focuses on the externalities problem, not the inequality problem in local services due to wealth and political power differences between local units.

158. *See id.* at 6 (urging "scholars to give greater attention to the state as a political and legal focal point in the system of local governments").

159. *See* STATE & REGIONAL PLANNING, *supra* note 61, at 4.

160. *Our Localism: Part I*, *supra* note 11, at 65.

161. *See id.*

162. *Id.* at 64.

163. *See* Johnstone, *supra* note 8, at 418.

164. *See* STATE & REGIONAL PLANNING, *supra* note 61, at 95.

165. *See Our Localism: Part I*, *supra* note 11, at 66-67. Even Oregon's land use program is "based on the premise that local governments are the primary units for effectuating land-use planning activity." STATE & REGIONAL PLANNING, *supra* note 61, at 64. Hawai'i is the only state

Intergovernmental coordination is only one objective of state and regional planning efforts. This Article addresses state and regional planning issues as they relate to achieving this objective of avoiding intergovernmental conflict. However, other major goals for regional planning, which will not be discussed here, include the protection of natural resources, growth management, providing and allocating affordable housing, agricultural land preservation, and ensuring an adequate infrastructure.[166] An example of how intergovernmental coordination can be achieved through regional planning is found in Florida, where each local government adopts a comprehensive plan for the community. This local comprehensive plan must then be coordinated with adjacent municipality and county plans, as well as with state and regional plans, and it must be demonstrated that the local plan's impact on adjacent communities has been taken into account.[167]

There are two basic models for state and regional control over land use planning and regulation.[168] The first is the "Planning Consistency" model, which attempts to overcome the problems of fragmentation and parochialism that are prevalent in local land use decision making by establishing three main requirements.[169] First, local governments must perform comprehensive land development planning.[170] Second, the local plan must be consistent with state and regional land use goals.[171] Finally, the Planning Consistency model requires consistency between local regulations and the local, state, and regional planning goals.[172] Therefore, if local regulations and decisions must take into account regional and statewide impacts, interlocal conflicts can be mitigated by thoughtful regional planning and appropriate coordination among the local governmental units.

The second model, the American Law Institute's Model Land Development Code (MLDC), was issued in 1975 to address state growth management regulation. If adopted by states, the MLDC replaces the Standard City Planning Act (SCPA) and the Standard State Zoning Enabling Act (SZEA) which were developed in the 1920s, and which have been adopted by a majority of states.[173]

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that provides for the statewide regulation of land and which has converted its state general plan into law. *Id.* at 126-27.

166. *See* STATE & REGIONAL PLANNING, *supra* note 61, at 99-101; Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 PACE L. REV. 481, 485 (1993).

167. *See* STATE & REGIONAL PLANNING, *supra* note 61, at 101-02.

168. *See* Wickersham, *supra* note 23. As of 1993, Vermont, Maryland, Georgia, Florida, Oregon, Hawai'i, Washington, Maine, Rhode Island, and New Jersey had adopted comprehensive planning and growth management systems, and Virginia, Pennsylvania, Texas, and California were also moving in the direction of developing a state and/or regional planning structure. *See* STATE & REGIONAL PLANNING, *supra* note 61, at 4-5.

169. *See* Wickersham, *supra* note 23, at 518-59.

170. *See id.* at 519.

171. *See id.*

172. *See id.*

173. *See* Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M.*

The ALI model permits the state to exercise authority over land use decisions affecting multiple municipalities,[174] and in so doing, attempts to address some of the concerns levied at typical planning and zoning statutes.[175]

Ideally, regional control over land use planning and regulation should follow the Planning Consistency model, which emulates the Oregon state growth management statute and which has substantially influenced the statutes in Georgia, Maine, Maryland, New Jersey, Rhode Island, Washington, Florida and Vermont.[176] This model of regional land use control has "proven more effective at shaping development patterns to meet environmental and social goals" than the American Law Institute's MLDC.[177]

In theory, state or regional land use control could provide a structure for encouraging local governmental units to cooperate in their planning and land regulation efforts. This cooperation would, in turn, enable local governments to share the benefits derived from commercial development, such as new job opportunities and an increased tax base, while providing a mechanism to mitigate or share the burdens generated by the development, such as traffic congestion and the need to increase police services. In reality, though, the implementation of regional planning and regulation does not necessarily achieve the goal of eliminating interlocal conflict over commercial development. Regional decision makers must be selected, and if the regional body is comprised of disinterested third parties appointed by a state agency, then local governments can validly complain that the decision makers are not familiar with quality of life issues in a particular locale, nor sufficiently impacted by the selection of new "neighbors." However, if the regional decision makers are selected from the various local governmental units, they may become too interested, and the process may break down because "collections of local government officials in regional guise but ultimately accountable politically only to their local constituencies cannot be expected to produce effective advocacy for state and regional interests."[178]

Local control proponents claim that keeping control at the local government

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Jackson and National Land-Use Legislation, 28 URB. LAW. 7, 20 n.74 (1996).

174. *See id.* at 20. States establish authority by designating areas of "critical importance." *Id.* However, the ALI estimated that only 10% of all land use decisions would involve these critically important areas, and hence, that states would retain control over 90% of the land use decisions. *Id.* at 21.

175. *See* Steven H. Magee, Comment, *Protecting Land Around Airports; Avoiding Regulatory Takings Claims by Comprehensive Planning and Zoning*, 62 J. AIR L. & COM. 243, 263 (1996). For example, the MLDC attempts to address criticisms of typical "lot-by-lot" development "by encouraging the compilation of wide amount of information and creating a 'land development plan' rather than a more traditional 'comprehensive plan.'" *Id.* at 264 n.132 (citation omitted).

176. Wickersham, *supra note* 23, at 451-52.

177. *See id.* at 450-51, 518. The MLDC was modeled after the Vermont statutory framework and provides for "state or regional regulation of major development projects, and state regulation of critical resources." *Id.*

178. *Our Localism: Part I*, *supra* note 11, at 67 (quoting T. PELHAM, STATE LAND-USE PLANNING AND REGULATION 42 (1979)) (discussing study of Florida's DRI program).

level, which is smaller in area and population than the state or region, encourages individual participation in the process and facilitates decision making for the common good.[179] The face-to-face interaction that is possible with a smaller unit enables people to understand more about each other and their needs and put aside individual self-interest for the public welfare.[180] It is also feared that regional planning will not work because coordination of the process will be administratively burdensome[181] and because decisions will be made by individuals or agencies who do not know enough about the topography, individuality, or character of the area. Often, however, cries to retain the "community character" of an area may just be a plea to give local preference for development that preserves "expensive homes and the affluent people who can afford to own them."[182] In contrast, less affluent communities cannot use local autonomy to "protect local social values and community character"[183] for they must instead encourage commercial development to increase their local property tax base to meet local demand for resources.[184] There can be no doubt that local regulatory decisions are "profoundly affected by local fiscal capacity"[185] and this "economic localism reflects and reinforces existing interpersonal and interlocal inequalities."[186]

Even if state or regional planning laws require that municipalities and counties coordinate development of plans and implementation of regulations,[187] or assess significant adverse effects of a proposed project,[188] final discretion may be reserved to the local units[189] and enforcement provisions for these coordination

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179. *See Our Localism: Part II*, *supra* note 4, at 396.

180. *See id.*

181. *See id.* at 399 ("urban economists see the empowerment of local governments as a way to overcome the perils of centralization"); *see also id.* at 402 (discussing economist view that "government is likely to be more efficient at the local level because the costs of government will be lower").

182. *Our Localism: Part I*, *supra* note 11, at 58 ("Local zoning autonomy often results in the promotion of local parochialism and a commitment to the preservation of community status regardless of the cost to other localities and to the balanced development of a region.").

183. *Id.*

184. *See id.*; *see also Our Localism: Part II*, *supra* note 4, at 351 (discussing the fact that fiscal health of most localities is based on decisions of private individuals and businesses to move to and remain in the boundaries of the locality); Johnstone, *supra* note 8, at 409 (discussing the zoning objective of some local governments to increase their tax base by rezoning to permit a major new shopping center or office complex).

185. *Our Localism: Part II*, *supra* note 4, at 424.

186. *Id.* at 425.

187. *See, e.g.*, OR. REV. STAT. § 197.025 (Supp. 1996); WASH. REV. CODE § 36.70A.100 (1991).

188. *See, e.g.*, CAL. PUB. RES. CODE §§ 21000-21002.1 (West 1996) (CEQA requires public agencies to give consideration to environmental effects in the decision-making process.).

189. *See* STATE & REGIONAL PLANNING, *supra* note 61, at 208 (discussing decision making under CEQA).

requirements are either lacking or inadequate.[190] Until states decide to truly reclaim the police power they have delegated to local authorities by taking a state or region-centered approach to land use planning, the ideology of localism will pervade any state or regional planning efforts that are not supported by adequate enforcement and the incentive to cooperate.[191] However, the ideal of local authority has been "sustained by legal doctrines, embraced by powerful economic and political interests and legitimated by academic theorists."[192] If state legislatures cannot manage to overcome this devotion to local autonomy in order to enact state or regional planning and regulation,[193] then local governments must, nevertheless, be required to cooperate with their neighbors or be provided the appropriate incentives to share the benefits and burdens of commercial development land use decisions. Part V discusses the possibility of creating state or regional planning models that retain local autonomy while providing a mechanism to eliminate or reduce interlocal conflicts over urban commercial development that affects more than one municipality.

V. Retaining Local Control by Providing Economic Incentives to Cooperate

A. Regional Planning: A Dream?

Regional planning is an essential component of any effort to control the impacts of land use decisions that span municipal boundaries.[194] The difficulty with using any planning model, however, is enforcing conformity of land use decisions with a specific plan. Some local governments have avoided the examination of their actions for conformity against a local general plan by establishing a "sufficiently vague plan, [such that] any land use ordinance arguably conforms."[195] The precedent of using a local plan as a guideline or local land use

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190. *See id.* at 217-18. *See also* Marie L. York, *Regions: Blind Isolation or Shared Vision?*, Land Use Law, Apr. 1995, at 3, 3 (Authority for regional planning may exist, but implementation is often missing.).

191. *See Our Localism: Part II*, *supra* note 4, at 451-52 (discussing problems created by ideology of localism).

192. *Id.* at 452. *See also* Johnstone, *supra* note 8, at 402-03 ("Tradition in this country of local government autonomy over local affairs is so strong that the federal government lacks effective power to force the requisite coordinated political action needed for comprehensive urban renewal.").

193. *See* Johnstone, *supra* note 8, at 446. Complete federal or state government takeover of growth control programs is one way to resolve the regional problems concerning sharing of benefits and burdens, "but on urban land use issues this has often proven to be impossible" because of local government's political strength and influence. *Id.*

194. *See* York, *supra* note 190, at 3 ("[R]egional planning has been advocated as an essential addition to local planning to control the phenomena that transcend city limits.").

195. Flavio Rose, *Planning and Dealing: Piecemeal Land Controls As Problem of Local Legitimacy*, 71 Cal. L. Rev. 837, 879 (1983).

regulation is strong in theory, but in practice courts have not always required a comprehensive plan as essential to actual regulation and, instead, have often upheld zoning ordinances and regulations as self-contained expressions of a plan and its implementation.[196] Therefore, before regional planning can be effective, land use regulation must adhere to and be consistent with a plan, whether that plan be local, regional, or both.

Assuming that state legislation requires local government to adopt a comprehensive plan before it regulates land use, municipalities can, nevertheless, amend their plans to conform with desired land use decisions. Whether comprehensive planning is required to take place at the local or at the regional level, local governments must have an incentive to cooperate both in the development of the local or regional plans and in the implementation and maintenance of these plans. If states have not been able to successfully implement mandatory regional planning, then municipalities must somehow be encouraged to participate cooperatively in the local planning processes of adjacent communities. The major issue becomes what type of legal rule will be effective in establishing this incentive to cooperate with surrounding local municipalities if the state has not mandated regional cooperation via a comprehensive (and enforceable) statewide or regional planning system.

B. Creating an Economically Efficient Legal Rule to Resolve Interlocal Conflict over Suburban Commercial Development

The economic approach to evaluating legal rules requires that we look primarily to efficiency, i.e., maximizing aggregate social benefit over aggregate social cost.[197] In order to evaluate the efficiency of a legal rule, two aspects of efficiency must be examined: incentives and risk allocation.[198] First, to create incentives for individuals, or in this case, municipalities, to behave efficiently requires that we determine how to persuade municipalities to take into account the effects of their land use decision making on the benefits of and costs to adjacent municipalities.[199]

The incentive issue includes two behavior features referred to as the "care decision and the activity-level decision."[200] In this case, the care decision would refer to the municipality's behavior that affects costs and benefits, i.e., land use regulation and decision making, given an assumed level of participation in this

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196. *See id.* at 849.

197. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 129-30 (Little, Brown & Co. ed., 1989). It might be possible to use an equitable approach to resolving intergovernmental conflict by distributing tax revenue on a need basis to various communities. However, the legal rule adopted to resolve intergovernmental conflict over commercial development should be based on efficiency criteria rather than equitable concerns.

198. *See id.* at 130.

199. *See id.* at 131.

200. *Id.*

regulatory behavior which creates the dispute.[201] The incentive question asks first, whether the legal rule proposed to control or resolve intergovernmental conflict creates incentives for municipalities to take the appropriate amount of care in their land use regulation and decision making. Care, in the land use situation, could be defined either as decision making that is supported by substantial evidence and is neither arbitrary nor capricious,[202] or as decision making that takes into account the welfare of residents outside municipal boundaries.[203] Therefore, any legal rule we derive for purposes of controlling intergovernmental conflict must start with the allocation of responsibility for externalities.[204] This Article proposes that any solution to the intergovernmental conflict problem start with the assignment of a legal right to a municipality not to be substantially impacted by land use decisions of an adjacent community. In other words, the legal rule must recognize the obligation of a municipality to consider the costs to communities outside its borders that are affected by local land use decisions.[205] Thus, any legal rule designed to resolve intergovernmental conflict over land use must be evaluated in terms of whether it creates incentives for municipalities to use care in taking into account the adverse impacts its land use decisions have on surrounding communities.

The second facet of the incentive question is the activity-level decision.[206] Here, the activity-level decision refers to the extent of the municipality's participation in land use decision making. Each municipality's decision about how much to participate in the land use decision-making process (e.g, approve requests for commercial development) affects its benefits (e.g., an increased tax base) and the expected burdens (e.g., increased traffic), including those burdens external to the municipality.[207] A municipality's decision to maintain a low activity level of land use regulation or growth and forgo the benefits of commercial development may, nevertheless, affect its level of burdens if surrounding communities are forced or encouraged to operate at a higher activity level.[208] Therefore, in order to determine the efficiency of a proposed legal rule

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201. *Id.*

202. This is the general judicial review standard applied to local land use decision making. MANDELKER, *supra* note 32, § 6.53, at 275.

203. *See supra* notes 47-64 and accompanying text (discussing nuisance and judicially-created obligation to control externalities).

204. *See* POLINSKY, *supra* note 197, at 11-12 (discussing Coase Theorem and its conclusion that the "efficient outcome will be achieved regardless of the assignment of the legal right").

205. *See supra* notes 47-64 and accompanying text (discussing municipal duty to consider welfare of nonresidents).

206. *See* POLINSKY, *supra* note 197, at 131.

207. Affluent communities may often seek to limit growth, while communities where residential wealth is limited will adopt policies to encourage development that is "clean" and will generate revenue. *See Our Localism: Part II*, *supra* note 4, at 424.

208. *See* James A. Kushner, *Growth Management and the City,* 12 YALE L. & POL'Y REV. 68, 73 (1994).

Existing growth management systems tend to generate growth in neighboring

to resolve intergovernmental conflict over commercial development, both the care decision, which requires municipalities to take externalities into account, and the activity-level decision,[209] which could result in burdens whether the municipality's activity level is high or low, must be evaluated together.

The risk-allocation question is the second aspect of the legal rule efficiency determination and asks whether the legal rule efficiently allocates risk among the relevant municipalities.[210] Risks include both beneficial ones, e.g., when it is uncertain how much tax-base growth will occur, and detrimental ones, e.g., when the burdens created by land use decisions are uncertain.[211] If risk cannot be eliminated, it is best to reduce the risk carried by a risk-averse party.[212] Because municipalities are likely to have a similar level of aversion to risk,[213] risk should be equally allocated among the municipalities.[214] Because the legal rule must provide for an equal allocation of risk among municipalities in order to achieve efficiency, factors other than risk-aversion, such as burdens identified by an environmental impact report, must be used to allocate the risk associated with land use decision making.

C. The Proposed Economically-Efficient Rule

The rule herein proposed, as an alternative to mandated, comprehensive, and enforceable statewide or regional planning addresses only the conflict between suburban municipalities created by commercial development. It does not profess to resolve the inequities in housing and education created by urban sprawl and the flight from the inner cities.[215] Nor does it address the "not in my back yard" (NIMBY) problem, where suburbs refuse to allow certain necessary facilities, such

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> communities. . . . Local governments often suppress the pace of development within their own communities. . . . Additionally, the dispersion of overall regional development patterns may be exacerbated by growth management systems because development sometimes leapfrogs to adjacent and nonadjacent communities that are more accommodating to growth.

Id.

209. *See* Been, *supra* note 9, at 531-32 (discussing competition between communities for growth that increases tax base and stating that "even communities that are not currently active competitors serve as a constraint upon their neighbors because they may reenter the competition at any time").

210. *See* POLINSKY, *supra* note 197, at 132.

211. *See id.*

212. *See id.* at 132-33.

213. Municipal decisions are made by public officials who are elected and are generally concerned about the support of their constituency for reelection. This structure is basically the same for all municipalities and will, therefore, likely place them at the same level of risk-aversion.

214. *See* POLINSKY, *supra* note 197, at 133.

215. *See Our Localism: Part II*, *supra* note 4, at 438-39 (discussing "jurisdictional separation of wealth and need that results from the fragmentation of most metropolitan areas into a central city surrounded by a multiplicity of suburbs").

as solid-waste disposal sites or jails, in their community.[216] The rule herein proposed for managing commercial development in the suburbs requires an initial allocation of the legal right to a municipality not to be substantially impacted by land use decisions made by adjacent communities. This allocation of a right not to be impacted creates an incentive for municipalities to assess the external effects of their decisions as long as this obligation is enforced. Instead of relying on litigation, as discussed in Part I, to enforce this obligation to care, the process should begin with cooperative planning, whereby adjacent municipalities meet to discuss their local comprehensive plans and determine when and where potential areas of conflict might arise with implementation of the local plans.[217] This planning process will allow municipalities to retain local autonomy while enabling them to assess the magnitude of their obligation not to substantially impact surrounding communities. State legislation should also facilitate contracting between municipalities[218] to ensure that agreed-upon local plans will not be amended without consultation with, or perhaps approval by, adjacent municipalities. If mandatory or voluntary planning and interlocal coordination is not available, the process can, nevertheless, proceed given the municipality's obligation to consider impacts on nearby residents.[219]

The EIS is an established structure, either at the federal level, the state level, or both, in which significant environmental effects are taken into account whenever a major project, such as a commercial development, is proposed.[220] The process proposed in this Article uses the EIS as a basis for distributing any anticipated benefits, such as tax-base growth, to those municipalities who are expected to suffer significant adverse effects from the proposed commercial development. Instead of sharing tax revenue based on some state or regional determination of need,[221] municipalities should jointly determine how to allocate proposed benefits and burdens. The process of using the EIS to allocate the risks

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216. *See id.* at 442-43 (discussing the NIMBY problem and its effect on suburban policies).

217. "Localities may accept some form of regional planning as long as the regional body lacks the power to effectuate its plans without local approval." *Id.* at 432.

218. *Id.* at 431 n.369 ("the number of interlocal agreements involving suburbs 'is remarkably small' because of suburban fears of becoming dependent") (citing J. BOLLENS & H. SCHMANDT, THE METROPOLIS: ITS PEOPLE, POLITICS AND ECONOMIC LIFE 328 (3d ed. 1975)); *see also id.* at 431-32 ("Interlocal cooperation is highly unusual and more commonly the product of state or federal compulsion than voluntary local action.").

219. *See id* at 431 (discussing interlocal cooperation and stating that "[a]lthough theoretically attractive, interlocal cooperation has in practice been relatively narrow in scope and typically confined to matters of technical infrastructure that realize economies of scale and effectuate regional economic integration, but that have only limited implications for local wealth and social status") (footnote omitted).

220. *See supra* notes 74-81 and accompanying text (discussing National Environmental Policy Act of 1969 and its requirement that agencies consider the environmental impact of their decision making in order to protect environmental quality).

221. *See supra* notes 136-43 and accompanying text (discussing Minnesota tax sharing legislation).

associated with commercial development land use decisions will treat municipalities, which will be assumed to have the same risk-aversion level, equally. The assignment to municipalities of a legal right not to be substantially impacted by external decision making, the knowledge by municipalities that their level of participation in allowing commercial development may not directly relate to the burdens they will experience, and the allocation of risks, both beneficial and burdensome, by using the existing EIS process, potentially establish the economic efficiency of the proposed process.

D. The Procedure To Facilitate Success of The Proposed Rule

The success of any legal rule depends on how the rule is implemented and how it is enforced. Conformance with state, regional, or local planning requirements can be facilitated through the use of economic incentives and/or sanctions. States with regional land use planning programs generally provide for state monitoring of local planning efforts and states may sanction local governments with the loss of eligibility for state funds if noncompliance is discovered.[222] For example, Washington state legislation provides a method to encourage local compliance with regional (county-wide) plans through the use of "incentives that take the form of technical assistance, grants, and priority funding for projects inspired by the planning process" and sanctions for noncompliance that include the temporary withholding of revenues collected by the state.[223] Maryland, Florida and New Jersey also use the sanction of withholding state funds in order to secure local compliance with state-mandated comprehensive planning,[224] while Rhode Island and Florida provide that the state will prepare a comprehensive plan if the local government fails to do so.[225] Therefore, the proposed process should include sanctions and incentives similar to those found in Washington, Florida, New Jersey, and other states that have successfully implemented state or regional planning programs.

Although sanctions and/or litigation may be necessary to ensure eventual compliance with a process that seeks to resolve intergovernmental conflicts over land use decisions, alternative dispute resolution (ADR) methods of negotiation, mediation, and/or arbitration are preferable approaches to securing long-term cooperation throughout the process of sharing commercial development benefits and burdens. Municipalities have several incentives to avoid litigation and choose, instead, an ADR approach. First, litigation is expensive.[226] Elected local officials

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222. *See* Johnstone, *supra* note 8, at 423-25 (discussing enforcement of local compliance with planning through use of sanctions and mediation as a method for resolving local-state conflicts over such compliance).

223. *See* STATE & REGIONAL PLANNING, *supra* note 61, at 142-44 (discussing countywide regional planning programs in Washington).

224. *See* Porter, *supra* note 166, at 493-99 (discussing sanctions and incentives used by various states to secure compliance).

225. *See id.* at 494.

226. *See* Place, *supra* note 102, at 374-75 ("The costs of litigating the strained interlocal

are hesitant to spend local tax money on costly litigation rather than on maintaining and improving the municipality infrastructure, for fear of losing the support of their constituency at election time. Second, litigation causes delays in the commercial development and may result, many times intentionally, in the abandonment of the project by commercial developers.[227] Finally, litigation is certainly not conducive to maintaining good ongoing relationships with adjacent municipalities.[228] Goodwill between municipalities is necessary for future land use decisions requiring cooperation between communities.

ADR approaches, such as negotiation and mediation, have the advantage of offering a less expensive alternative that can avoid protracted litigation and that can strengthen ongoing relationships between communities. Negotiation and mediation offer the opportunity for local government staff and/or officials to have face-to-face contact[229] with the goal of producing an agreement which meets the interests of each side, fairly resolves the areas of conflict, is enduring, and takes the greater community interests into account.[230] The trend toward greater local government participation in ADR is reflected in the routine use by cities and counties of "arbitration and mediation techniques to resolve labor disputes, construction contract disputes and disputes over the value of property taken through eminent domain."[231] These techniques can similarly offer the advantage of resolving intergovernmental conflicts over commercial development "in a more cost effective and less adversarial manner."[232]

Negotiation is a method of ADR that requires the parties to discuss problems, with or without the aid of representatives and/or a facilitator, and arrive at a mutually acceptable solution.[233] In mediation, a similar process, the disputing

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relations and fact that a judicial proclamation addresses only a fraction of the area-wide problems and issues involved . . . may be sufficient incentive to the municipality to participate in ADR methods.").

227. Bustillo & Sommer, *supra* note 90, at B1.

228. *See* Place, *supra* note 102, at 375; *see also* Bustillo & Sommer, *supra* note 90, at B1.

229. *See Our Localism: Part II*, *supra* note 4, at 396. Briffault discusses the advantages of small size governmental units including the ability to have face-to-face interaction with its companion benefits of "empathy and commitment to the common good." *Id.* at 396 n.217 (quoting J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 270, 275 (1980)); *see also* Place, *supra* note 102, at 367 n.147 (alternative dispute resolution methods refer to processes where "disputing parties meet face to face and attempt to reach an acceptable resolution, either by way of consensus or by submitting the issue to a neutral third party for determination") (citing GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES 5 (1986)).

230. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES 4 (2d ed. 1991) (defining a "wise agreement").

231. Jeffrey B. Groy & Donald L. Elliott, *Using Arbitration and Mediation to Resolve Land Use Disputes*, 15 CURRENT MUN. PROBS. 190, 197 (1988-89) (citations omitted).

232. *See* Place, *supra* note 102, at 367.

233. For an overview of how negotiation relates to mediation and other ADR processes, see CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 6, 14 (1986).

parties seek the active assistance of a neutral third party, the mediator, who does not impose a solution, but instead directs the parties in their efforts to reach a solution.[234] Because skilled mediators lead the discussions in mediation, dispute resolution often occurs quicker than through unaided negotiation.[235] Therefore, mediation is the procedure recommended herein, both for distributing the benefits and burdens of commercial development as determined by the EIS and for resolution of interlocal conflict. The process of negotiation may be an effective process for implementing regional planning or local planning that takes regional impacts into account. However, mediation should be used as the dispute resolution process when municipalities experience conflict in the planning process[236] or when they must meet to allocate benefits and burdens according to the EIS.

Finally, arbitration is a process similar to litigation because it involves the use of an arbitrator with the authority to impose a solution, but arbitration is generally less formal and faster than the judicial system.[237] Nonetheless, because arbitration results in a decision that is imposed on the parties, rather than a resolution arrived at by the parties themselves, the process is not as conducive to maintaining good relationships as are the methods of negotiation and mediation.[238] Still, arbitration is a viable alternative to litigation if the parties cannot arrive at a mutually satisfactory solution using negotiation or mediation.

Therefore, considering these ADR options, this Article proposes that municipalities be required to mediate the allocation of commercial development benefits and burdens that extend across municipal boundaries using the EIS as the information source. If an allocation decision cannot be mutually agreed upon and supported by an interlocal contract, the parties should be required to submit to binding arbitration. Binding arbitration will foreclose the parties from continuing the dispute in the litigation process unless they challenge the arbitrator's decision as unreasonable or as an abuse of discretion.[239]

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234. *See id.*

235. *See id.*

236. *See* JOHN M. DEGROVE, THE NEW FRONTIER FOR LAND POLICY: PLANNING & GROWTH MANAGEMENT IN THE STATES (1992).

237. *See id.*

238. *See* Joseph Shade, *The Oil & Gas Lease and ADR: A Marriage Made in Heaven Waiting to Happen,* 30 TULSA L.J. 599, 621 (1995).

> Mediation "is far less adversarial than litigation or arbitration, and therefore less [likely to disrupt existing] relationships." If the parties are able to resolve the dispute consensually through negotiations, the relationship which existed prior to the dispute may be preserved. In some instances, the relationship may even be strengthened because the parties sometimes come to appreciate each other's differing points of view.

Id. (alteration in original) (footnote omitted) (quoting CENTER FOR PUB. RESOURCES, ADR FOR OIL AND GAS INDUSTRY DISPUTES 6 (1991)).

239. Paul Salvatore, *Alternative Dispute Resolution in Employment Law: The Pros, the Cons, and the How, in* ALTERNATIVE DISPUTE RESOLUTION (ADR): HOW TO USE IT TO YOUR ADVANTAGE 537, 565-66 (A.L.I.-A.B.A. Course of Study No. C976, 1994). "Arbitration awards are generally

California has encouraged the use of ADR to resolve land use conflicts by enacting the Land Use and Environmental Dispute Mediation Act,[240] which encourages the use of collaborative problem solving in land use planning and regulation.[241] The Act provides that suits brought in superior court as a result of actions such as the approval or denial of a development project or an act or decision made pursuant to CEQA may be subject to a mediation proceeding.[242] The mediation proceeding must follow the procedure defined in the Act and includes the mutual selection of a mediator experienced in land use issues and a time limit of thirty days for this selection.[243] However, the Act only seeks to encourage and facilitate mediation, allowing the parties to resort to the judicial system if they cannot reach a voluntary resolution.[244] Using the Act as a basis, the Western Justice Center has proposed an ADR system for the Southern California Association of Governments (SCAG)[245] that can be used to resolve interjurisdictional disputes such as city revenue sharing.[246] This proposed system offers an excellent procedural mechanism for using ADR to resolve interlocal disputes arising from spill-over impacts of land use decisions and tax-revenue sharing.[247] Although this model could easily be adapted to serve as the procedure for implementing the rule proposed in this Article, the entire process should be made mandatory, rather than voluntary.[248] Furthermore, conservative timelines, e.g., thirty days to select a mediator, should be established in the mediation process so that proposed commercial projects are not unreasonably delayed. If mediation fails to achieve a satisfactory allocation of benefits and burdens based on the EIS, such that neighboring communities can mutually approve a proposed commercial project having regional impacts, then the parties will be required to select an arbitrator and proceed immediately to binding arbitration. This use of mandatory ADR techniques may seem somewhat contrary to the principles of ADR, which generally encourage voluntary participation in a consensus-building process. However, local governments will need this incentive to cooperate in order to

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subject to challenge only when: (1) Bias is shown on the part of the arbitrator; (2) Material and relevant evidence is not even considered; or (3) The decision is arbitrary and capricious." *Id.* (footnotes omitted).

240. CAL. GOV'T CODE §§ 66030-66037 (West Supp. 1997).

241. *Id.* § 66030.

242. *Id.* § 66031.

243. *Id.*

244. *Id.* § 66030.

245. SCAG is one of the four major regional Councils of Government (COGS), which are voluntary organizations made up of elected city and county officials within each region. York, *supra* note 190, at 6.

246. WESTERN JUSTICE CTR., HAYES FOUND., ALTERNATIVE DISPUTE RESOLUTION SYSTEMS (1995) (available in Pepperdine University School of Law, Straus Institute for Dispute Resolution).

247. *See id.* at 53-57.

248. *See id.* at 41 (emphasizing that "participation in a SCAG-sponsored dispute resolution process does not limit any of the parties from withdrawing at any time and pursuing other means of pressing their position or seeking redress").

successfully resolve interlocal conflicts without resorting to litigation or the loss of local autonomy through state-mandated land use decision making.[249]

CONCLUSION

With the growth of metropolitan areas, where local borders artificially divide areas that are economically and socially interdependent, interlocal conflicts frequently arise where one municipality's land use decisions adversely affect surrounding communities.[250] Yet local governments have little interest in cooperating with their neighbors, and "[i]ntegrated regional policies on these matters are uncommon."[251] Municipalities will not take extralocal effects into account nor share the benefits of commercial development with neighboring communities unless they are required to do so by a legal rule which encourages them to cooperate.[252] The trend in growth management programs is toward increased state government involvement in land use planning and regulation[253] and state or regional planning appears to be the most effective and efficient method for avoiding interlocal conflicts.[254] However, state or regional planning and control has not been universally accepted as the solution to controlling interlocal disputes; the devotion to local autonomy, fueled by the ideology of localism, has kept many states from successfully addressing the problems of interlocal inequities and local externalities.[255]

To resolve the interlocal conflicts that arise when commercial development occurs in a suburban area and affects neighboring municipalities, a legal rule is needed that will encourage, but not require, regional planning and that will resolve

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249. *See* Johnstone, *supra* note 8, at 402-03 (discussing difficulty of getting local governments to cooperate).

250. *See Our Localism, Part II*, *supra* note 4, at 426-27.

251. *Id.* at 443. "[S]uburbs prefer to rely on their own resources, protect their own values and shun fiscally draining and socially threatening ties to the cities." *Id.*

252. See *id.* at 434 for a strong statement of this problem:

> Local governments will not, as long as they need not, take extralocal effects into account, give a voice to nonresidents affected by local actions, internalize externalities, make compensatory payments for negative spillovers or transfer local wealth to other communities in the region to ameliorate fiscal disparities. Without federal or state intervention, so roundly condemned by localists, the pervasive problems of externalities and interlocal service inequalities reflecting tax-base disparities will certainly persist.

253. *See* Johnstone, *supra* note 8, at 418.

254. *See supra* notes 152-93 and accompanying text (discussing the solution of state and/or regional planning); *see also Our Localism: Part II*, *supra* note 4, at 451-54 (stating that "problems of interlocal inequities and local externalities cannot be satisfactorily addressed" without greater state participation in land use planning and regulation, and suggesting that the ideology of localism be "jettisoned" in order to allow development of legal doctrines that combine local initiative and state oversight).

255. *See Our Localism: Part II*, *supra* note 4, at 451-52 (discussing how the ideology of localism has obstructed the ability of states to address interlocal problems).

disputes without resorting to expensive and delaying litigation and without sacrificing local autonomy. The rule requires an initial allocation of a right to municipalities to be free from significant adverse effects resulting from land use decisions of adjacent communities. This potentially efficient rule can either require or merely encourage communities to participate in a regional planning effort using local comprehensive planning as the basis for discussion. The incentive to cooperate in regional planning is achieved by the municipality's knowledge of an obligation to surrounding communities not to adversely impact nonresidents. If municipalities choose not to cooperate, they will nevertheless be held accountable to other communities for local land use decisions that result in external negative impacts.

Once it has been determined, through the existing federal and/or state environmental impact process, that a proposed commercial development project impacts adjacent municipalities, the decision making municipality will be required to mediate a resolution of these externalities. The mediation process will facilitate the allocation of tax-base growth and projected burdens that the project will generate among the impacted municipalities. Interlocal contracting can be employed at this point in the process, as well as earlier in any regional planning process, to assure local governments that their interests will be protected. The mediation process will provide municipalities with the opportunity to conduct face-to-face negotiations and avoid unnecessary delay and expensive litigation. If the mediation process is successful in allowing the parties to reach a satisfactory solution for sharing the benefits and burdens of commercial development, the municipalities will strengthen their relationships and promote future collaborative problem solving. However, the mediation process must not depend on voluntary cooperation for success. Local governments must be given a strong incentive to cooperate in a timely and reasonable manner by requiring binding arbitration of the allocation of benefits and burdens if the mediation process fails to produce results within a reasonable time. Only by eliminating the use of litigation as a tactic for the delay of commercial development projects and by encouraging municipalities to cooperate in the mandatory allocation of benefits and externalities can interlocal conflicts be resolved while simultaneously preserving municipal relationships and permitting beneficial economic growth.

CONSTITUTIONAL ILLITERACY

REVIEW ESSAY OF LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES*

PAUL E. MCGREAL*

INTRODUCTION

In my constitutional law class, we begin the semester, appropriately enough, at the beginning of the Constitution: the Preamble. The opening words of the Preamble are a fruitful area for discussion: "We the People."[1] At first, these words seem both majestic and all-inclusive. Next, however, discussion turns to the question whether the words, historically understood, mean what they say. The Constitution itself shows that slaves—though the word slavery appears nowhere in the document—are not part of this "We." Also, knowledge of history shows that women were not part of this "We." Similarly, not all white men were meant to be a part of "We." Rather, "We the People" really meant "We the Adult White Male Property Owners."[2]

Does the disjunction between the apparent and actual meaning of "We the People" really make a difference? Probably. The Constitution, ratified by "the People" assembled in state conventions, created a representative democracy. Also, Articles I (legislative branch) and II (executive branch) of the Constitution created a democratic republic that assumed individual participation in government. Thus, the Constitution reveals that both the consent and the participation of the governed were important aspects of the new government. To the extent that groups subject to the Constitution and its regime were not asked for their consent or participation, we should be troubled by the narrow definition of "We the People."

Professors Louis Michael Seidman and Mark V. Tushnet make a similar definitional move in their new book *Remnants of Belief: Contemporary Constitutional Issues*.[3] According to Professors Seidman and Tushnet, we are in the midst of a constitutional crisis: "*Americans* are preoccupied with constitutional argument even though they know that very few people are actually

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1. U.S. CONST. preamble.

2. *See* RICHARD B. MORRIS, THE FORGING OF THE UNION: 1781-1789, at 173 (1987) ("The original Constitution we now recognize to have been basically a document of governance for free white propertied adult males.").

3. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996).

persuaded by the arguments they make."[4] Their claim begs a very important question—who are these "Americans" preoccupied by constitutional argument. As argued later, Seidman and Tushnet's "Americans" encompass a very narrow group.[5] The "Americans" they speak of are a group I call "constitutional professionals," which include academic commentators, judges, and public figures who engage in discussion of constitutional issues for a living.[6]

But, so what? Who cares if another book by legal academics talks about and to their own kind? We should care because Seidman and Tushnet define the "Americans" who are "preoccupied" by constitutional issues in a narrow and elitist manner. By defining "Americans" too narrowly, Seidman and Tushnet miss a problem with the constitutional arguments among "Americans." The problem is that the Constitution is missing from these public constitutional arguments. Many people feel free to speak about what the Constitution requires without making any effort to link their arguments to the Constitution itself. This complaint is not an appeal for a strict textual reading of the Constitution.[7] Rather, it is a plea for these arguments to have the Constitution's text as a common starting point; if people do not know the language of the Constitution, it is difficult to formulate a successful argument.[8]

This Essay has two missions. First, to plead for a more universal view of who matters when we speak about the relevant community for constitutional argument. Second, to suggest some lessons we might learn from taking a more universal view of this community. These points are developed in five parts. Part I discusses Seidman and Tushnet's thesis that a constitutional crisis is on the horizon. Part II analyzes Seidman and Tushnet's definition of "Americans" whom they say are heading toward a constitutional crisis. This discussion suggests that some academic writing makes generalizations about society based on observations about a narrow slice—and, as it turns out, a rather elitist slice—of the population. Part III identifies the constitutional crisis that afflicts America generally, constitutional illiteracy, and Part IV asks why we should care about this problem. Part V concludes with a suggested cure for the constitutional illiteracy that ails

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4. *Id.* at v. (emphasis added).

5. *See infra* notes 37-43 and accompanying text.

6. Professor Michael Kammen has made a similar classification in his study of the Constitution in American popular culture. *See* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF at xi (1986). Professor Kammen analyzed how the Constitution was viewed by "ordinary Americans." *Id.* "'Ordinary' does not refer to their social status or degree of education, but rather to the fact that they are nonprofessionals: not lawyers, nor judges, nor professors of constitutional law." *Id.*

7. Constitutional arguments may take many forms including: text, history, structure, precedent, political theory, and all the other arguments that flow from these sources. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (describing six basic methods of constitutional argument: historical argument, textual argument, doctrinal argument, prudential argument, structural argument, and ethical argument).

8. Later, this Essay discusses examples of constitutional arguments that suffer from a failure to consider the Constitution's text. *See infra* notes 68-78 and accompanying text.

America—the America we *all* inhabit.

I. THE COMING CONSTITUTIONAL CRISIS

According to Professors Seidman and Tushnet, American debate over constitutional issues is in crisis. In part, the crisis is that no one has irrefutable answers to constitutional issues. There is always another side to the argument. For example, if one judge or commentator argues that state action is present under certain circumstances, another can make an equally plausible argument to the contrary. We cannot agree.

The inability to answer constitutional questions is only the beginning of our constitutional crisis. Judges and commentators compound the problem by *acting as if* they know the answers, even though—as Seidman and Tushnet show throughout their book—these judges and commentators *cannot* prove that they are right.[9] Under this view, current constitutional discourse is merely an act of self-deception and, thus, is doomed.[10]

The main culprit in dooming constitutional discourse is the disemboweling effect of legal realism and the partial endorsement of that theory by the architects of the New Deal. Several realizations arise from this aspect of the New Deal. First, action versus inaction is a false distinction. Government inaction is really a *choice to perpetuate* the status quo. Seidman and Tushnet use the case of *Miller v. Schoene*[11] as a running example of this concept.[12] In *Miller*, Virginia faced an unfortunate choice. At that time, the state had a large apple industry threatened by a form of tree disease known as cedar rust. The disease grew on cedar trees and then spread to apple trees. The disease was harmless to the cedar trees, but destroyed apple trees. To eradicate the cedar rust and protect the apple trees, Virginia decided to destroy the cedar trees.

The owners of the cedar trees sued Virginia for compensation; they claimed that the state had "taken" their cedar trees within the meaning of the Takings Clause.[13] The Court dismissed this challenge in a passage highlighted and relied on extensively by Seidman and Tushnet: "[T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other. . . . It would have been *none the less a choice* if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards . . . to go on unchecked."[14] If Virginia had chosen to do nothing, it would have decided to destroy the apple orchards. Either way, the state acted

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9. SEIDMAN & TUSHNET, *supra* note 3, at 5. ("Our aim is to explain why so many constitutional questions are hard and why so many commentators pretend that they are easy.").

10. *See id.* at 193-94.

11. 276 U.S. 272 (1928).

12. SEIDMAN & TUSHNET, *supra* note 3, at 26-27.

13. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

14. *Miller*, 276 U.S. at 279 (emphasis added). *See also* SEIDMAN & TUSHNET, *supra* note 3, at 26-27 (discussing *Miller*).

to favor one property interest over another. Inaction is a *choice*, and that choice is action. Seidman and Tushnet emphasize this point by repeatedly citing *Miller* or quoting the phrase "none the less a choice."[15]

By discrediting the action versus inaction distinction, legal realism shows that all of society is somehow constructed by government action. Nothing in society can be the result of a neutral baseline unaffected by political preferences. Rather, "everything in social life results from a choice by government. . . ."[16] This insight has important consequences for how we view social institutions. For example, the notion of a "free" marketplace where individuals act autonomously in "private" transactions is based on an erroneous assumption. The marketplace has a set of initial property rights as a starting point for so-called "private transactions," and the initial allocation of property rights is a political act of government.[17]

The realist insight about the marketplace shows why the demise of the economic due process doctrine associated with *Lochner v. New York*[18] was inevitable. In *Lochner*, the Supreme Court held that a New York law limiting the number of hours that bakers could work violated the Fourteenth Amendment's due process protection of "liberty."[19] According to the Court, the then-existing common law rules of contract—under which the law left the employer and the bakers free to set work hours—was a natural condition of liberty, free from government action.[20] Any act by the state legislature to change that common law was deemed an infringement of the parties' liberty rights.[21] *Miller*, however, teaches that a legislative decision *not* to change the common law is "none the less a choice." Consequently, a state's choice to "do nothing" was a decision to "permit" the consequences of the common law rules.[22] Because a state's courts stood ready to enforce those rules, the state's choice not to change the rules was an endorsement of them.

As Seidman and Tushnet amply demonstrate in their book, the implications of *Miller's* "none the less a choice" argument go far beyond economic due process. Most obviously, the argument has a devastating effect on the concept of

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15. SEIDMAN & TUSHNET, *supra* note 3, at 27, 30, 68 (examples of where that phrase can be found).

16. *Id.* at 27.

17. Further, legal realism has taught us that there is no objective way to set these initial starting points. Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523, 529 (1996); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820-21 (1935); Mark V. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1402 (1984).

18. 198 U.S. 45 (1905).

19. *Id.* at 53, 64; *see* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

20. *See Lochner*, 198 U.S. at 64.

21. *See id.*

22. *See* Miller v. Schoene, 276 U.S. 272, 280 (1928). *See* SEIDMAN & TUSHNET, *supra* note 3, at 30.

state action in constitutional law.[23] If state action is *everywhere*, a state action requirement is meaningless.[24] For example, the Equal Protection Clause prohibits only state discrimination, not private discrimination. A decision by the legislature not to prohibit private discrimination is a government "choice" to permit private discrimination and, thus, is government discrimination.[25] Indeed, under this view, the states could be under a *duty* to enact anti-discrimination laws, lest their inaction be judged state action permitting private discrimination.[26]

But, *Miller*'s "none the less a choice" argument—that *all* action is government action— cannot be true. "[S]ome conception of individual action not attributable to the state is necessary to the existence of rights."[27] If *Miller* is right, individuals become wholly vulnerable to the government because "[w]ithout a private sphere in which individual decisions are not attributable to the government, the very concept of individual right loses its meaning."[28] The problem is trying to determine how far short of *Miller* we should stop and how to define a sphere of individual action not attributable to the state and therefore protected from state intervention. Seidman and Tushnet argue that there is no principled way to draw this line and, thus, no one can claim to have drawn it correctly.[29]

The bulk of *Remnants of Belief* applies *Miller*'s "none the less a choice" insight to constitutional issues such as unconstitutional conditions, racial equality, pornography,[30] campaign financing, and the death penalty. In each case, they persuasively demonstrate how this insight prevents convincing resolution of the issue.

Herein lies the constitutional crisis: although no one can legitimately claim to have the "right" answers to constitutional questions, many commentators *act as if* they have the answers. Also, according to Seidman and Tushnet, each author's resolution of constitutional questions *just happens* to coincide with that author's

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23. *See* SEIDMAN & TUSHNET, *supra* note 3, at 63-68.

24. *See id.* at 68.

25. *See id.* at 30.

26. *See id.* at 111.

27. *Id.* at 63.

28. *Id.* at 51. If all private action is government action, such action cannot be private and as a result, individual action would not be protected against government intervention. *See* Ronald J. Krotosynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 323 n.109 (1995).

29. *See* SEIDMAN & TUSHNET, *supra* note 3, at 70-71.

30. The "none the less a choice" argument is particularly effective in the free speech area. Obviously, if government passes a law that limits certain speech it has restricted speech under the First Amendment guarantee of free speech. Yet, under *Miller*, the opposite choice may have the same effect. Certain speech, it is argued, has the effect of silencing or devaluing the speech of others. This is one of the arguments against pornography—it silences or devalues speech by women. By refusing to regulate such "silencing" speech, the government has made a choice to permit such speech, and this government choice or government action devalues or silences speech by women. Thus, it is false to say that government regulation of pornography would restrict speech and failure to regulate would not restrict speech. *Id.*

political preferences.[31] Seidman and Tushnet suggest that this correlation between scholarly conclusion and political disposition is no accident.[32] Rather, because the post-New Deal "none the less a choice" insight makes constitutional argument inherently malleable, authors can manipulate constitutional arguments to further their political agendas. Yet, authors still write as if they are correct and their opponents are wrong. "There has been a persistent tendency to treat constitutional questions as if they were easy and the answers as if they were obvious. It naturally follows from this belief that one's opponents are foolish, or evil, or dangerous extremists bent on fundamentally transforming bedrock constitutional principles."[33] The result is "the politics of polarization—the demonization of opponents and the oversimplification of complex problems that are hallmarks of constitutional argument."[34]

Seidman and Tushnet offer a solution to that constitutional crisis: self-awareness and tolerance. We should become *aware* of the weaknesses in our arguments, and with this awareness, be *tolerant* of the arguments made by others.[35] Only then can we move away from the "politics of polarization," and move toward a dialogue in which we can "at last . . . talk directly to each other without the necessity of filtering our disagreements through overblown constitutional rhetoric."[36]

II. WHO ARE "WE"?

In diagnosing our constitutional crisis, Seidman and Tushnet claim to identify an ailment that afflicts constitutional debate among "Americans" generally.[37] In setting to their task, they state, "Some representative examples of the sort of constitutional argument we are talking about—drawn from the popular press, public discussions, and the law reviews—will help frame our argument."[38] After reading the book, however, one realizes that Seidman and Tushnet are discussing a problem in a rather narrow slice of America. As noted above, "Americans" means "constitutional professionals," those who think and write about the Constitution for a living. Indeed, a perusal of the "Bibliographic Essay" included at the end of the book shows that their "representative examples" are drawn from

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31. *See id.* at 20-21. For example, Seidman and Tushnet point specifically to Professor Michael McConnell's treatment of selective abortion funding and funding of religious activities. *Id.* at 16-18. *See* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991). They note that McConnell's conclusion on the constitutionality of each practice coincides with his substantive commitments on each issue. *See* SEIDMAN & TUSHNET, *supra* note 3, at 16-18.

32. *See* SEIDMAN & TUSHNET, *supra* note 3, at 21.

33. *Id.* at 4.

34. *Id.* at 193.

35. *Id.* at 198, 200.

36. *Id.* at 193.

37. *Id.* at v.

38. *Id.* at 5.

legal academics,[39] academics from other disciplines,[40] professional public commentators,[41] and judges [42]—all constitutional professionals. Also, almost all of the sources cited appear in law reviews, law books, and case reports. Only two citations to publications of general circulation are included—two newspapers—and only for factual background, not as examples of constitutional argument.[43]

Seidman and Tushnet, then, base their critique of American constitutional debate on a narrow definition of America—constitutional professionals. These individuals are likely an elite group.[44] Consequently, Seidman and Tushnet's critique and proposed solution apply to a problem with constitutional debate in a narrow slice of "America," not Americans generally. Like "We the People," Seidman and Tushnet's "America" is narrowly defined.

A book that Seidman and Tushnet cite favorably commits the same sin of

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39. Just a smattering of the academic works cited are: BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 HARV. L. REV. 989 (1991); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992). The Bibliographic Essay continues in this vein, with citations predominantly to law review articles and books by constitutional professionals. SEIDMAN & TUSHNET, *supra* note 3, at 203-16.

40. Nat Hentoff, *Is Congress Going to Bring Back George III*, WASH. POST, Nov. 9, 1991, at A27. *See* SEIDMAN & TUSHNET, *supra* note 3, at 203-16.

41. George Will, *The Flag Dispute: Individualism Redux*, NEWSDAY, July 3, 1989, at 43; George Will, *The Flag Isn't the Only Thing Burned Up*, NEWSDAY, June 26, 1989, at 51; George Will, *Affirmative Action Gets a Good Knock*, NEWSDAY, Jan. 30, 1989, at 50; George Will, *How Can a Judge Impose Birth Control?*, NEWSDAY, June 26, 1988, at 10 [hereinafter Will, *How Can a Judge Impose Birth Control?*].

42. *See, e.g.*, DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Miller v. Schoene, 276 U.S. 272 (1928). *See* SEIDMAN & TUSHNET, *supra* note 3, at 203-16.

43. *See* Ruth Marcus, *Court Runners-up Drew President's Warmest Praise; Clinton Settled on Breyer as Less Risky Choice*, WASH. POST, May 15, 1994, at A6 (cited for factual background of President Clinton's nomination of Stephen Breyer to the Supreme Court); Kathy Fair, *'Every Woman and Child' Faces Rape, Judge Says; McSpadden Says Castration Should Be Sex Case Option*, HOUSTON CHRON., Oct. 13, 1992, at 17A. Of course, Seidman and Tushnet also cite to the newspapers that carry Nat Hentoff and George Will's columns. *See supra* notes 40-41.

44. *Cf.* Romer v. Evans, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins — and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 177 (1996).

defining America in elitist terms. Dean Anthony Kronman's *The Lost Lawyer: Failing Ideals of the Legal Profession*[45] argues that the American legal profession currently suffers from a malaise—a loss of purpose.[46] In an earlier time, lawyers were motivated by an ideal of the lawyer as statesman.[47] This ideal of the lawyer-statesman derived from "the belief that the outstanding lawyer—the one who serves as a model for the rest—is not simply an accomplished technician but a person of prudence or practical wisdom as well."[48] Today, however, the bottom line has displaced this ideal as the profession's prime motivating force.[49]

In making his diagnosis, Kronman focuses on the influence of American law schools, law firms, and courts on the legal profession. Kronman, however, takes a narrow view of what counts as American law schools and law firms. By law schools, he means the elite, national law schools that center their curricula around the law-and-subject of the moment.[50] Legal scholarship is the product of the professors at these same schools.[51] Wholly ignored are the legions of "other" law schools that have not done so. Also, he ignores the scholarship in non-elite law reviews, where doctrinal analysis is often sophisticated and prevalent.

Kronman suffers from the same myopia when he critiques the American legal profession. On this score, however, Kronman acknowledges his narrow focus and offers a justification:

> Today, as in the past, only a small percentage of lawyers practice in large corporate firms (those, let us say, with one hundred or more attorneys and a predominantly business clientele). Indeed, data collected in 1980 indicate that roughly three-quarters of all the lawyers in private practice "either practice alone or in firms having ten members or less." But the large corporate firm continues to exercise an influence, both within the profession and outside it, that far exceeds its numerical strength. However influence and power are measured—whether in raw economic terms or in subtler political ones—these firms remain the leaders of the bar. In that respect, their position is little different from what it was a generation ago, or even earlier.[52]

This is Kronman's only attempt to make his observations about large firms

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45. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

46. *Id.* at 3.

47. *See id.* at 2-3.

48. *Id.* at 2.

49. *See id.* at 4 ("[T]he explosive growth of the country's leading law firms . . . has changed forever the practice of the lawyers in them and created a new, more openly commercial culture in which the lawyer-statesman ideal has only a marginal place. . . .").

50. *Id.* at 6 (addressing the "scholarly culture . . . in the country's leading law schools"). Kronman focuses primarily on the effects of the law and economics and critical legal studies movements. *See id.* at 166-68, 225-64.

51. *See id.* at 266-70.

52. *Id.* at 273-74 (footnotes omitted).

relevant to the *entire* practicing bar.[53] The passage makes clear that his book is written about and for a narrow slice of the American legal profession.[54] Like "We the People" and Seidman and Tushnet's "Americans," the "Lawyer" in Kronman's "The Lost Lawyer" is not as inclusive as it first sounds. "The Lost Lawyer" is really "The Lost Lawyer Who Graduated from an Elite Law School and Practices in a Large Firm in a Large City."

So why should we care that authors like Seidman, Tushnet, and Kronman write about and to a narrow audience? Simply put, their narrow focus ignores problems in America at large. How one defines the set of relevant people determines *whose problem* one ultimately diagnoses. Our next task, then, is to diagnose the crisis in constitutional debate among Americans generally.

III. *CONSTITUTIONAL* ARGUMENT?

A. Open Up and Say "Ahhh . . .": Diagnosing Our Constitutional Ailment

Seidman and Tushnet are correct to worry about what passes as constitutional argument in today's popular culture. When the Supreme Court upheld the Pennsylvania abortion statute at issue in *Webster v. Reproductive Health Services*,[55] the local television news in my city reported that the Supreme Court had held that abortion was illegal. This must have frightened or falsely encouraged many people who took the reporter's word on the issue. Unfortunately, our constitutional literacy is so poor that even the media can misunderstand that the Constitution does not restrict abortions, but rather addresses the government's ability to do so. In other words, the Constitution largely addresses state action,[56] rarely imposing requirements directly on private

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53. Others have attempted to address the malaise that affects particular areas of practice. Professor Charles Ogletree has offered one such effort for lawyers in public defender offices. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

54. In speaking with Texas lawyers who practice in smaller communities, the current President of the Texas Bar has learned that these practitioners have different needs and views than their large firm counterparts. *See* Colleen McHugh, *A Commitment to Texas Lawyers*, 59 TEX. B.J. 512, 512 (1996) (Lawyers in small towns "talked about life in a small town, imploring us to remember the 'country lawyers' and the particular needs of small-firm practitioners.").

55. 492 U.S. 490 (1989).

56. This is not to say that the state action requirement is easy to understand or apply. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1688-91 (2d ed. 1988); Charles L. Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (describing the Court's state action cases as "a conceptual disaster area"). Indeed, at times an otherwise private enterprise may be treated as a government actor if the private and government conduct are sufficiently intertwined. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (holding that private coffee shop in public parking garage was a state actor restricted by the Constitution). Yet, the core intuition—which can get lost in public constitutional argument—is that government action is the

individuals.[57] Ignorance of the state action requirement is ignorance of what the Constitution does—what it is fundamentally about.

The problem of constitutional illiteracy goes well beyond the state action doctrine. Seidman and Tushnet correctly note that many people appeal to the Constitution on a hotly-debated issue to signal the importance of the issue or the strength of their views. Such actions parallel de Toqueville's observation that most political issues in America inevitably become judicial issues.[58] Similarly, today most every important political issue in America, sooner or later, is made into a constitutional issue.

If political issues are converted into legal issues (as de Toqueville suggests) or constitutional issues (as Seidman and Tushnet suggest), Americans will need to know something about legal argument or constitutional argument to continue the debate. Indeed, de Toqueville observed that Americans of his time were prepared to follow political issues into the courts:

> There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions. As most public men are or have been lawyers, they apply their legal habits and turn of mind to the conduct of affairs. Juries make all classes familiar with this. *So legal language is pretty well adopted into common speech; the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.*[59]

According to de Toqueville, as political discussion became entwined with the law, law-talk was assimilated into popular political discourse. If this assimilation did not happen, the public at large would be left out of political discourse.

Unfortunately, modern Americans have not assimilated the Constitution into their political arguments as readily as de Toqueville's Americans assimilated legal language into their political arguments. To do so, modern Americans would need a working knowledge of how the game of constitutional interpretation is played.[60]

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focus of the Constitution.

57. Indeed, the only provision of the Constitution that may apply directly to individual action is the Thirteenth Amendment's prohibition of slavery. U.S. CONST. amend. XIII; *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Congress' power to legislate under the Thirteenth Amendment extends to regulation of private conduct.). Conversely, the Court has held that Congress' power under the Fourteenth Amendment extends only to regulation of state action. *See* The Civil Rights Cases, 109 U.S. 3 (1883). Of course, this is not to suggest that the line between "state" and "private" action is an easy one to draw. *See supra* note 56.

58. de Toqueville wrote: "There is hardly a political question in the United States that does not sooner or later turn into a judicial one." ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 248 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966) (1835).

59. *Id.* (emphasis added).

60. *See* SEIDMAN & TUSHNET, *supra* note 3, at 3-4.

Yet, when we redirect our focus to the American public generally, we see that popular constitutional arguments often are not *constitutional.* Instead, the Constitution is played as a trump card that is meant to end discussion. The speaker makes little, if any, effort to explain why her argument derives from the Constitution. In sum, what is missing most from American constitutional argument is the Constitution itself.

B. Looking at American Constitutional Argument

In looking at constitutional argument among Americans generally, we start with how Americans use—or misuse—the *text* of the Constitution. Because all constitutional arguments flow from the text,[61] either directly or indirectly, the text must form a common ground, otherwise we cannot recognize what the speaker is saying as constitutional argument; we may as well be speaking different languages.[62]

An example discussed by Seidman and Tushnet, drawn from the work of popular political commentator George Will, illustrates the failure to appeal to text. In one article, Will criticized the decision of an Arizona trial court judge to condition the probation of a mother convicted of child abuse on the mother's continuing use of birth control. Will opined: "When government tampers, surgically or chemically, with sexuality, it is touching personal identity. In light of the recent elaboration of a woman's privacy rights, as defined in constitutional law concerning abortion, it is hard to imagine [the judge's] sentence withstanding the scrutiny in an appeals court."[63] Will makes a common form of argument in public debate. The argument goes like this: "If the Constitution protects right X, then it *certainly* must protect right Y." The author hopes that the reader will have the same visceral reaction to the situation that the author did. Seidman and Tushnet criticize Will for offering an unpersuasive constitutional argument. They

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61. One such argument is history or original intent. The ignorance of constitutional text is compounded by a popular ignorance of basic American history. *See* Lewis H. Lapham, *The Importance of Studying U.S. History*, HARPER'S MAG., Jan. 1, 1996, at 7. ("Assume that the existence of the American democracy requires the existence of an electorate that knows something about American history, and [a recent] . . . press release from the U.S. Department of Education can be read as a coroner's report."). Another such argument relies on the structures of government created by different parts of the text. *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIPS IN CONSTITUTIONAL LAW (1983).

62. Recently, Professor Laurence Tribe has argued that constitutional argument must obey certain rules to be recognized as such. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (Professor Tribe criticizes the arguments in recent articles by professors Akhil Amar and Bruce Ackerman as outside the bounds of proper constitutional argument.); *see* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

63. Will, *How Can a Judge Impose Birth Control?*, *supra* note 41, at 10. *See* SEIDMAN & TUSHNET, *supra* note 3, at 7.

note several counterarguments that Will did not address, as well as some of the faulty assumptions that underlie his argument.

The problem with Will's argument is that it is does not count as *constitutional* argument.[64] Will's lesser-must-be-included-in-the-greater argument—that protection of a broad right (right X) clearly requires, as a matter of inexorable logic, the protection of a second, supposedly lesser included right (right Y)—relieves the author of the burden of articulating the precise basis for protecting the lesser included right. At the most basic level, Will does not identify the constitutional text he relies on. The reference to the abortion cases suggests that the Due Process Clause may be doing the work.[65] But, why does the Due Process Clause protect abortion? Why is abortion analogous to imposition of birth control as a condition of probation? How has due process changed since *Roe v. Wade*[66] articulated its vision of the right to privacy? Why not include *Griswold v. Connecticut*'s[67] contraception decision? Will is one of the more thoughtful lay commentators on constitutional issues, and yet, he leaves all of these questions unanswered. This example does not bode well for popular constitutional argument.

Another error seen in popular constitutional argument is misquoting the Constitution's text. The popular discussion of gun control laws is replete with examples of this type of misargument. Opponents of gun control argue that gun control laws are unconstitutional because the Second Amendment protects a largely unfettered right of individuals to purchase and possess firearms. This right

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64. Will's discussion of the term limits issue in his book contains the same flaw. GEORGE WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY (1992). At one point, Will discusses the States' constitutional authority to place term limits on federal representatives. Will's only reference to the Constitution is to the Times, Places and Manner Clause in Article I, Section 4. *Id.* at 223. Will's discussion fails to explain why a term limit is a time, place or manner restriction (a viewpoint the Supreme Court rejected in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)), and wholly ignores the Qualifications Clauses in Article I, Sections 2 and 3. Also, although Will refers to Supreme Court cases dealing with a tangential issue, he wholly ignores the most relevant case, *Powell v. McCormack*, 395 U.S. 486, 548 (1969), in which the Court held that Congress cannot add to the Constitution's list of qualifications for federal representatives. WILL, *supra*, at 223-24.

65. In *Roe v. Wade*, 410 U.S. 113, 153 (1973), Justice Blackmun was deliberately vague about what constitutional text supported a woman's right to terminate a pregnancy:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . ., as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Subsequent cases have made clear that the Court sees the right as an aspect of due process "liberty." *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.").

66. 410 U.S. 113 (1973).

67. 381 U.S. 479 (1965).

arguably derives from the Second Amendment's command that "the right of the people to keep and bear Arms, shall not be infringed."[68] For example, during his unsuccessful bid for the 1996 Republican presidential nomination, Pat Buchanan said, "That Second Amendment right *to keep and bear arms* is a right that . . . comes before the Constitution."[69] Similar statements appear in letters-to-the-editor in newspapers around the country:

- "The Second Amendment to the U.S. Constitution . . . protects the right to bear arms. . . ."[70]
- "Our founding fathers meant for Congress, the President and all governmental authorities never to infringe on the rights of the people to keep and bear arms."[71]
- "[T]he Second Amendment right to keep and bear arms . . . ."[72]
- "The people's right to keep and bear arms shall not be infringed period."[73]
- "[M]y Second Amendment right to bear arms . . . ."[74]

On their face, the above quotes appear persuasive — the Constitution's command seems clear. Indeed, Buchanan and others should be applauded for appealing to the Constitution's text. Each speaker, however, omits an entire qualifying clause that the Framers tacked onto the beginning of the Second Amendment: "*A well regulated Militia, being necessary to the security of a free state*, the right of the People to keep and bear Arms, shall not be infringed."[75] Whether this additional text is fatal to the above claims is beside the point of this Essay.[76] Rather, the important point is that advocates of a prominent constitutional issue do not feel the need to read or cite the full text of a constitutional provision. Some writers probably paraphrased the text based on what they heard others say. Indeed, a number of the above quotes refer to a "right to bear arms"—a misquote itself. So much for constitutional text.

Of course, proponents of gun control commit similar errors. Consider the

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68. U.S. CONST. amend. II.

69. Michael Rezendes, *In Arizona, Buchanan Lashes Gun Control*, BOSTON GLOBE, Feb. 26, 1996, at 7 (emphasis added).

70. David Callender, *Gun Rights Wording Worries Prosser*, WIS. ST. J., Feb. 17, 1996, at 4A (reporting on a proposed amendment to the Wisconsin state constitution that would protect "the right to keep and bear arms for any lawful purpose including for security or defense, for hunting and for recreational use.").

71. Jeanne Sexton, *Letters From the People*, ANCHORAGE DAILY NEWS, June 11, 1995, at M3.

72. G.C. Hammond, *Metropolitan Voices: News Media on the Mark on Gun-Permit Application*, WASH. TIMES, Jan. 25, 1996, at C2.

73. Jim Dore, *Letters From the People*, ANCHORAGE DAILY NEWS, Jan. 26, 1996, at B10.

74. David J. Giurintano, *Readers' Views*, BATON ROUGE ADVOC., Jan. 24, 1996, at 6B.

75. U.S. CONST. amend. II (emphasis added).

76. This question is subtle and complex and has been addressed by several thoughtful commentators. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

following letter-to-the-editor in the *St. Petersburg Times*:

> I don't believe how people who claim to believe in God can look the other way when so many of God's innocent children are being killed by people who *hide behind a few sentences in our Constitution*, which was written more than 200 years ago. In those days, our people needed guns because our country was a mixture of frontier towns and vast wilderness. Today, the proliferation of guns has turned our cities into jungles and our suburbs into killing fields.[77]

What text is the writer referring to? The writer makes no effort to locate his argument within the Constitution. Given that the issue is gun control, the text is likely the Second Amendment. But, even a glance at the text of the Constitution would show that the Second Amendment is *one* sentence, not a "few." So much for familiarity with the text.[78]

Other examples from popular commentary show that knowledge of text does not necessarily ensure logical argument based on that text. Consider the following writer's argument:

> I am neither a constitutional scholar nor a lawyer. But I am a concerned citizen who feels that the main clause of the Second Amendment—"the right of the people to keep and bear arms, shall not be infringed"—stands independent of its subordinate clause and says exactly what the founders our [sic] great nation wanted it to say.[79]

Again, one must ask "why"? Other than the author's undefined "feeling," he offers no constitutional principle which supports severing one clause from another? The author offers no explanation of any history supporting such a reading.

Poor constitutional argument is not limited to Second Amendment commentators. A writer questioning the constitutionality of President Clinton's actions in sending American troops to Bosnia argued: "The bottom line is that our Constitution does not authorize [military deployments for humanitarian purposes]. We either have a Constitution or we don't."[80] I guess we will just have to take the writer's word for it; he offers no text or other explanation in support of this bald

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77. Arthur McIntyre, *Officials, Back Gun Control and 'Stop the Slaughter' Series: Letters*, ST. PETERSBURG TIMES, Feb. 22, 1996, at 2 (emphasis added).

78. The writer also expresses an attitude that is perhaps more disturbing than mere ignorance of the text. The writer suggests that the Constitution is a mere technicality which those opposing gun control try to "hide behind." The writer further suggests the irrelevance of the Constitution by referring to its age and, presumably, its obsolescence. In doing so, the author relegates the Constitution to irrelevance on the issue—it's ok to not know anything about the Constitution because it is an irrelevant technicality.

79. Lawrence F. Pace, *In Second Amendment, 'People' Are the Core*, BUFFALO NEWS, Jan. 13, 1995, at B2.

80. George Schmall, *Letters to the Editor: Support of Deployment Shows Ignorance of the Constitution*, DAYTON DAILY NEWS, Jan. 8, 1996, at 7A.

assertion about the President's power. This gap also exists on the side of those supporting the President: "I am appalled to read . . . [a letter to the editor] calling for Congress to impeach and remove the commander in chief for carrying out his constitutional right and duty of directing his troops to join their European counterparts in an effort to make [the] Balkan peace last."[81]

The above quotes on gun control and presidential power may reveal an additional problem with popular constitutional argument: Laypersons have an attitude that one need not shoulder the burden of explaining *why* their argument derives from the Constitution. If constitutional debate follows this road, it will quickly resemble the old beer commercials where warring camps alternately yelled "less filling" and "tastes great." Constitutional debate could become a shouting match in which slogans substitute for argument.

Even when people take on the burden of offering an explanation, ignorance of the Constitution's text can still be fatal to their argument. Consider the following letter-to-the-editor that attacks a proposed bill to limit welfare payments to unwed mothers:

> It is my understanding that a child born in the United States is a citizen of the United States. The marital status of the mother has nothing to do with that child being a citizen. Its rights are the same as those of any other child, whether born to a married or unmarried mother.
>
> It therefore would appear that it would be unconstitutional to deny welfare benefits to one child based upon the marital status of the mother.[82]

The writer fails to explain what "right" in the Constitution forbids discrimination against unwed mothers and their children. The mere fact of citizenship cannot be enough because virtually all laws discriminate between citizens on some basis. Also, what provision of the Constitution supposedly prevents this discrimination? The Equal Protection Clause? The Citizenship Clause? Perhaps the writer is claiming that some Americans have a constitutional right to welfare. This claim, however, would beg even more questions than an antidiscrimination argument (such as from where does such a right derive and what are the limits of such a right).

The problem of public ignorance of text is compounded by public ignorance of the historical setting and meaning of the Constitution.[83] Regardless of whether

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81. Denis Huang, *Keeping Peace in Bosnia*, SALT LAKE TRIB., Jan. 4, 1996, at A10.

82. James B. Nash Jr., *Letters From the People*, ST. LOUIS POST-DISPATCH, Oct. 7, 1995, at 14B.

83. Many commentators have observed that Americans have poor knowledge of their own history. *See* KAMMEN, *supra* note 6, at 23-29, 230; Michael Kammen, *Refuting Some Common Myths: Constitution 1787-1987*, ST. PETERSBURG TIMES, May 31, 1987, at 1D (describing a survey that found Americans' knowledge of the Constitution to be "downright embarrassing."); Lewis H. Lapham, *The Importance of Studying U.S. History*, HARPER'S MAG., Jan. 1, 1996, at 7; Alan Miller, *Sad Truth of Rampant Ignorance Among Teens*, SAN DIEGO UNION TRIB., Feb. 21, 1988, at Books-4 ("In short, many 17-year-olds are woefully ignorant of their cultural heritage."); Barbara Vobejda, *Humanities Education: 'Startling Gaps'; Schools Emphasize Skills Over Knowledge, Study Says*,

one ultimately adopts history or drafter's intent as the method of constitutional interpretation,[84] history must accompany text as the starting point of interpretation. One must first understand the Constitution *as written* before moving to other theories of constitutional interpretation. Only by gaining such an understanding can one evaluate whether contemporary society is different *in a way that is relevant to the meaning of the Constitution.* Thus, without a knowledge of history, Americans are not armed to take the first step beyond text in interpreting the Constitution.[85]

In sum, many Americans suffer from constitutional illiteracy at a most basic level—ignorance of text and history. Our constitutional crisis is that the Constitution itself is missing from American constitutional debate. Only by addressing constitutional illiteracy can we begin to resolve this crisis.

IV. WHO CARES?

Before moving to solutions, we must ask a relatively simple question: Should we care that the American public is constitutionally illiterate? Why not be content that *some* people are minding the constitutional store? In fact, should not those with the most interest be left to carry on constitutional debate—academics who bring a genuine and enthusiastic commitment to the debate, litigants who bring their personal causes, judges who bring their craft,[86] and public interest groups who bring their ideological commitment. Indeed, that is one argument behind the requirement of standing—issues will be best aired by those with a stake in their

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WASH. POST, Aug. 31, 1987, at A1 ("American schools are producing students with 'startling gaps in knowledge' of history and literature. . . .").

84. Indeed, the theory of original intent is fraught with difficulties. First, whose views does one count as the definitive statement on original intent? GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 41-42 (3d ed. 1996). The drafters? The ratifiers? Second, what does one do when several of the supporters or drafters of a constitutional provision had different views of the provision's meaning? *Id.* Third, at what level of generality should we look for an original intent: broad concepts (e.g., equality) or specific outcomes (e.g., separate public schools are inherently unequal)? *Id.* at 42; Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 490-91 (1981). Supporters of original intent theory have responses to these challenges. *See* EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW 20-36 (1994); Earl M. Maltz, *A Minimalist Approach to the Fourteenth Amendment*, 19 HARV. J.L. & PUB. POL'Y 451, 454 (1996); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-65 (1989). However, those problems are not easily solved.

85. For the importance of history in constitutional interpretation, even to those who reject original intent as a method of interpretation, see *infra* notes 127-32 and accompanying text.

86. On the topic of judicial craft, see Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1053-54 (1995).

outcome.[87] So, why should we care?

Although I hope that the last question is read by most as rhetorical, I offer three answers. First, to do otherwise is to disrespect the abilities of others. Ignoring constitutional illiteracy would send a message that only the few, the proud who engage in constitutional debate for a living are *able* to do so. This is not to say that all people ought to be constitutional professionals. Only that constitutional professionals ought not exclude laypersons from the conversation. We ought to embrace Thomas Jefferson's declaration, made in support of his proposal that the Constitution be re-written each generation, that "I am not among those who fear the people."[88]

Second, to do otherwise is to disrespect the autonomy of others. Constitutional illiteracy should not be an excuse for cutting the bulk of America out of constitutional argument, but rather a call to greater constitutional literacy. As Thomas Jefferson has also written, "no safe depository of the ultimate powers of the society [exists] but the people themselves: and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it away from them, but to inform their discretion."[89] Professor Joseph Goldstein has made a similar point in explaining why the Supreme Court ought to write opinions that are intelligible to the average American:

> If Ours is to be an "intelligent democracy," if Our revolutions are to be peaceful, We the People . . . must be able to learn, from Our own reading of the Constitution and the Supreme Court's construction of it, what rights We have and do not have, what values are and are not protected, and what limits are and are not imposed on those who govern on Our behalf. For then We can meet Our responsibility as informed citizens to respond to what the Court did and why it did it.[90]

By choosing to ignore the problem of constitutional illiteracy—and, as *Miller v. Schoene*[91] should teach, our decision is "none the less a choice"—we have decided

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87. *See* Flast v. Cohen, 392 U.S. 83, 99 (1968) (requirement of standing "assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). Of course, many commentators have noted that a standing requirement is not necessarily the best way to ensure such adverseness. *See* STONE ET AL., *supra* note 84, at 100; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFF. U.L. REV. 881, 891 (1983).

88. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 615 (Adrienne Koch & William Peden eds., 1993).

89. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 5 (1992).

90. GOLDSTEIN, *supra* note 89, at 6.

91. 276 U.S. 272 (1928).

that the intelligent participation of many in our government is not worth the cost of constitutional literacy.[92] In effect, we have devalued the voice of many Americans in our government, and robbed them of an important means of autonomy.[93]

Third, constitutional illiteracy will make the Constitution irrelevant to public decisionmaking and, in turn, threaten constitutional protections. As Solicitor General Drew Days has observed, ignorance of the Constitution has led to an "attitude that suggests we have lost confidence in our ability to deal with our problems *while remaining faithful to the Constitution.*"[94] Consequently, public debate and government decisionmaking increasingly occur without consideration of the constitutionality of government action; that issue will be determined by the

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92. This choice may also be in tension with the principle of "equal citizenship" that underlies the Constitution. U.S. CONST. amend. XIV, § 1. Professor Kenneth Karst defines the principle of "equal citizenship" as follows:

> While respect for each individual's basic humanity is the primary value in the principle of equal citizenship, the principle also encompasses two related and overlapping values: participation and responsibility. A citizen is a participant, a member of a moral community who counts for something in the community's decisionmaking processes. No less importantly, a citizen is a responsible member of society, one who owes obligations to his fellow members. Both these values contribute to self-respect, but they also have independent significance.

Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 8 (1977). On this view, when we ignore the problem of constitutional illiteracy, we deny people the background they need both to exercise their right to participate intelligently in government and to fulfill their responsibility to do so.

93. This is a point that Justice Antonin Scalia and other members of the Supreme Court have made, that the "remedy" for many wrongs should be found in the political process, not the courts. *See* Romer v. Evans, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in th[e] culture war" over sexual orientation); Planned Parenthood v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting) ("[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing regional differences, the Court merely prolongs and intensifies the anguish."); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 465 (1983) (O'Connor, J., dissenting) ("[W]hen we are concerned with extremely sensitive issues, such as [abortion], 'the appropriate forum' for their resolution in a democracy is the legislature."); Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (arguments about the wisdom of a law "are properly addressed to the legislature, not to" the courts); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious.").

94. Abe Zaidan, *Young People Urged to Stand by Constitution*, PLAIN DEALER, Dec. 2, 1994, at 2B (emphasis added) (U.S. Solicitor General Drew S. Days noted that "America knows very little about the Constitution. People are not aware of what the Constitution provides in terms of protection.").

courts at a later date. Yet, to best safeguard constitutional values, each branch of government should determine for itself whether proposed government action violates the Constitution.[95] Although a court might ultimately halt unconstitutional government action *after* some harm has been done, the legislature or executive can prevent unconstitutional government action by *preventing the government from acting in the first place*. By removing the Constitution from public debate, we also allow Congress and the President to abdicate their roles as guardians of our constitutional protections.[96]

If the public and their representatives do not consider the Constitution, we should expect a greater incidence of constitutionally suspect government action, with a corresponding burden on constitutional rights. The effect will last at least until someone with the money and the time is able to persuade a court to halt the government action. The current political scene holds examples of the political branches abdicating their role as constitutional guardians.

U.S. Solicitor General Drew S. Day has suggested that the Chicago police's "sweep searches" of public housing projects were the result of such an abdication.[97] Without reason to suspect individual residents of wrongdoing, the police randomly searched apartments for evidence of drug dealing or other crime.[98] Unsurprisingly, a federal court quickly halted the sweep searches because they violated the Fourth Amendment.[99] However, the court's action came too late for those already subjected to the searches. As the federal court stated in enjoining the police sweeps, such disregard for the Constitution by public officials in one area of one city "will ultimately undermine the rights of each of us."[100]

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95. Thomas Jefferson expressed this view in a letter to Abigail Adams:

> [N]othing in the Constitution has given [the courts] a right to decide [constitutional issues] for the Executive, any more than [for] the Executive to decide for them. . . . The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it . . . .

Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* STONE ET AL., *supra* note 84, at 55.

96. *See* Richard Dooling, *Most of These Guys Are Lawyers, Right?*, N.Y. TIMES, June 15, 1996, at A2 (arguing that lawmakers knowingly pass unconstitutional laws to score political points with their constituents). Dooling suggests: "Maybe we should have a separate session of Congress every so often so politicians can pass popular bills while pretending that the Constitution doesn't exist." *Id.*

97. *See* Zaidan, *supra* note 94, at 2B.

98. *See* Stephen Braun, *Chicago Police Seek Warrantless Sweeps to Seize Guns*, L.A. TIMES, Apr. 7, 1994, at A16.

99. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994) (A preliminary injunction was appropriate because "*an overwhelming body of law* demonstrates a substantial likelihood that the [Chicago Police's] Search Policy violates the Fourth Amendment.") (emphasis added).

100. *Id.* at 797.

The Communications Decency Act of 1996 (CDA)[101] contains another example of constitutional abdication. A section of the CDA prohibits Internet distribution of information about abortion.[102] The section is a patently unconstitutional restriction of free speech. Most obviously, the section conflicts with the Supreme Court's precedent protecting abortion advertising.[103] Also, the law is presumptively unconstitutional because it regulates speech based on its content.[104] President Clinton recognized these obvious points in signing the Act into law when he stated that the Justice Department will "decline to enforce that provision of current law."[105] Yet, when Congress considered and passed the CDA, the Constitution was missing in action.

Another provision of the CDA further demonstrates that the Constitution may be irrelevant to the political branches of the federal government. One section effectively bans dissemination of any "indecent" material on the Internet.[106] Generally, government can only ban dissemination of "obscene" material and is limited to narrower regulations of indecent material.[107] At the time of the enactment, this part of the CDA was arguably unconstitutional. Although the Justice Department later announced that it would delay enforcement of the prohibition of indecent material,[108] and an ultimately successful legal challenge was in the works,[109] some universities and an Internet access provider began

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101. Pub. L. No. 104-104, §§ 501-561, 110 Stat. 56, 133-43 (1996) (codified in scattered sections of 18 U.S.C. and 47 U.S.C.).

102. 18 U.S.C.A. § 1462 (West Supp. 1997). Prior to the CDA, federal law prohibited distribution of abortion material by an "express company or common carrier." 18 U.S.C. § 1462 (1994). The CDA extended the prohibition to the Internet.

103. *See* Bigelow v. Virginia, 421 U.S. 809 (1975).

104. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."). To overcome this presumption, the government must show that the law is necessary to achieve a compelling government interest. *Id.* at 382-83.

105. President's Statement on Signing the Telecommunications Act of 1996 (Feb. 12, 1996), *in* 11 WEEKLY COMP. PRES. DOC. 218, 219 (1996). *See also* Davis v. United States, 512 U.S. 452, 463-65 (Scalia, J., concurring) (noting Justice Department's failure to enforce 18 U.S.C. § 3501 (1994)).

106. 47 U.S.C.A. § 223(d) (West Supp. 1997).

107. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996); FCC v. Pacifica Found., 438 U.S. 726 (1978); Miller v. California, 413 U.S. 15 (1973).

108. *See Federal Judge Blocks Internet Indecency Law*, DALLAS MORNING NEWS, Feb. 16, 1996, at 1D ("A Justice Department spokesman said it was the agency's policy not to begin prosecutions under a law while it was being challenged in court."); Peter H. Lewis, *Judge Blocks Law Intended to Regulate On-Line Smut*, N.Y. TIMES, Feb. 16, 1996, at D5 (It is the Justice Department's "policy not to begin prosecutions under a law while it was being challenged in court.").

109. A provision of the CDA was challenged in the District Court for the Eastern District of Pennsylvania. After a hearing, the district court judge entered an order enjoining enforcement of the law. ACLU v. Reno, 929 F. Supp. 824, 827 (E.D. Pa. 1996), *aff'd*, 65 U.S.L.W. 4715 (U.S. June 26, 1997). Next, pursuant to the expedited review provision in the CDA, the Chief Judge of

censoring their Internet services to avoid legal problems.[110] In other words, the CDA, though dormant and on the road to judicial interment, chilled speech. Under these circumstances, one would have hoped for careful consideration of the provision's constitutionality. Yet, Vice President Al Gore, Clinton Administration cheerleader for the Information Superhighway, indicated that the Administration was leaving the constitutionality of the indecency provision to the courts.[111] The Constitution, then, was irrelevant to Executive Branch consideration of that provision.

By removing the Constitution from public debate and lawmaking, constitutional illiteracy threatens the vitality of the Constitution itself. If the public and its representatives feel free to ignore the Constitution—abdicate their responsibility to safeguard that document[112]—law professors and other ivory-tower-dwellers can do little in their academic journals and books to recapture the spirit. Also, with the Supreme Court trimming its caseload to the bone,[113] we cannot expect that Court to settle all of our constitutional disputes. And, just because judicial redress may be in the offing does not mean that ill-advised, unconstitutional laws will not cause significant harm *before* a court can stop the bleeding.

In sum, respect for others as well as the Constitution itself demands that we

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the Third Circuit convened a three-judge panel to consider the constitutionality of the law. Communications Decency Act of 1996, Pub. L. No. 104-104, § 561, 110 Stat. 56, 142-43. That panel ultimately determined that the CDA's restriction of indecent material on the Internet violated the First Amendment's guarantee of the freedom of speech. ACLU v. Reno, 929 F. Supp. at 883. The Supreme Court affirmed the three-judge panel's decision.

110. *See* Lewis, *supra* note 108, at D1 (an Internet access provider commented that "the law is very vague in some areas, so what is required of me to be in compliance is in question."); Thomas R. O'Donnell, *Universities Worry Over Internet Content*, DES MOINES REG., Mar. 6, 1996, at 1 ("Professors, students and administrators at Iowa universities say the law could force them to remove some material from Internet cites used by students and scholars. . . .").

111. *See* Peter H. Lewis, *Protest, Cyberspace-Style, for New Law*, N.Y. TIMES, Feb. 8, 1996, at A14 ("Vice President Gore had said this week that he continued to support the telecommunications bill, but he said the courts were the proper place to decide the constitutionality of the Communications Decency Act.").

112. This responsibility could be seen as part of the "equal citizenship" that Professor Karst has articulated. *See supra* note 92.

113. *See* Linda Greenhouse, *Case of the Shrinking Docket: Justices Spurn New Appeals*, N.Y. TIMES, Nov. 28, 1989, at A1 ("Since the middle of its last term, the Court appears to have cut back sharply on the number of cases it is granting."); Al Kamen, *Fewer Clerks Has No Appeal*, WASH. POST, June 8, 1994, at A21 ("this term's 84 rulings will be the fewest since 1961 . . ."); David G. Savage, *Docket Reflects Ideological Shifts: Shrinking Caseload, Cert. Denials Suggest an Unfolding Agenda*, A.B.A. J., Dec. 1995, at 40, 40 (1995) (during the October 1995 term, the Court was on pace to "issue written decisions in roughly 75 cases, about half the workload of a typical term during the 1980's."); David G. Savage, *With a Lighter Caseload, Supreme Court Moving Toward End of Term*, L.A. TIMES, June 5, 1993, at A16 ("This term, the court is expected to issue written decisions in 116 cases, down from a norm of more than 150 per term in the mid-1980's.").

solve the problem of constitutional illiteracy. To respect our fellow citizens, we must treat them as actors who are capable of understanding and acting on constitutional principles. To respect the Constitution, we must ensure that the Constitution's protections are a part of political decisionmaking, both by the public and its representatives.

V. WHAT NOW?

Seidman and Tushnet offer a solution to a narrow problem—how to revitalize constitutional argument among constitutional professionals. Unfortunately, as noted above,[114] this solution does not address the problem of constitutional illiteracy that afflicts constitutional argument in the general public. Before the general public can participate in the type of debate that Seidman and Tushnet address, they must learn the building blocks of such argument. The following are some initial suggestions for providing the building blocks for constitutional literacy.

A. What Should Americans Know?

1. Text.—First, there must be more popular attention to text. The text of the Constitution should be the foundation for all types of constitutional argument. Even if later arguments are based on the Constitution's history, structure, or purpose, such arguments assume the existence of *text* that *has* a history, *creates* structures, or *has* a purpose.

Take the example of whether the Constitution protects a woman's decision to seek an abortion. Popular proponents of constitutional protection often appeal to the right to privacy. For the argument to work as constitutional argument, however, the right to privacy must be located within the Constitution's text. As to the proper text, a person has several choices. First, as some have suggested, the woman's right to choose to end her pregnancy may be linked to the Equal Protection Clause.[115] Second, some may adopt the privacy approach taken by Justice William Douglas in *Griswold v. Connecticut*.[116] Justice Douglas argued that several amendments create overlapping zones of privacy.[117] Third, as the Court has held since *Roe v. Wade*,[118] the right is a component of the "liberty"

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114. *See supra* note 44 and accompanying text.

115. U.S. CONST. amend. XIV. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 272-85 (1993) ("We might . . . explore another argument on behalf of the abortion right, one that is grounded in principles of equal protection. This argument sees a prohibition on abortion as invalid because it involves an impermissibly selective co-optation of women's bodies."); Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 95-96 (1991).

116. 381 U.S. 479 (1965).

117. *See id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.") (citations omitted).

118. 410 U.S. 113 (1973).

protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[119]

2. Beyond Text.[120]—Even after selecting a text, one may find that the answer is not clear because the chosen text is susceptible to more than one interpretation. On abortion, the Due Process Clause will pose particular difficulties. How does the speaker overcome the fact that the clause speaks only of procedure? On its face, the clause *allows* infringements of liberty when "due process" procedures are followed. Once that obstacle is surmounted, the speaker must determine what activities or choices count as "liberty"? Also, can government *never* restrict liberty? Or, only under certain circumstances? What circumstances and how do these circumstances relate to abortion?

Text alone cannot answer all our questions.[121] Professors Jordan Steiker, Sanford Levinson, and J.M. Balkin illustrate this point with the example of the Presidential Qualifications Clause.[122] The Clause reads in pertinent part: "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the office of President . . . ."[123] As the authors demonstrate, under one literal reading of this text, all Presidents since Zachary Taylor were *not* qualified to hold that office.[124] They point out that the phrase "at the time of the Adoption of this Constitution" can be read to modify *both* "Citizen of the United States" and "natural born Citizen."[125] Thus, to be qualified for the Presidency, one must have been a citizen of the United States—natural born or otherwise—at the "time of the Adoption of the Constitution." No President since Zachary Taylor could meet these requirements.

Although as a matter of text this interpretation must be counted as "reasonable," few if any people—either constitutional professionals or laypersons—would likely accept this interpretation. "It's silly," or "That's just plain stupid," might be some of the reactions. But why? If the answer is, "Because the Constitution set up a government that was supposed to endure over time," the speaker has gone outside the text to rely on the *purpose* of the document

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119. *See id.* at 153; *see also* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

120. Justice Antonin Scalia is one of the few commentators to self-consciously acknowledge the difficulty of making the choice of which source(s) to consult besides the text of the Constitution itself. Scalia, *supra* note 84, at 862-65; *see also* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

121. *See* BOBBITT, *supra* note 7, at 38.

122. Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995). The article was spurred by a contest published *in Contest: Was George Washington Constitutional?*, 12 CONST. COMMENTARY (1995).

123. U.S. CONST. art. II, § 1, cl. 5.

124. Steiker et al., *supra* note 122, at 239-40.

125. They argue that the placement of the comma after "United States" requires this interpretation on a strictly textual basis. "Indeed, it seems clear enough that our reading of the text is absolutely required under a plain meaning approach that pays due attention to the Constitution's words and its punctuation." *Id.* at 245.

or the *intent* of those who drafted it. Either way, a source outside of the four corners of the text comes into play.[126]

Thus, constitutional literacy requires some constitutional knowledge beyond the text alone. As suggested above, history ought to be a primary source beyond text.[127] History shows that many provisions of the Constitution were written to address problems existing *at the time of the founding*. Any constitutional theory must take account of that fact and explain whether and, if so, how changed circumstances affect the current application of these provisions.[128] For example, one might take a modified Jeffersonian view of constitutional argument. Just as Jefferson believed that each generation should be allowed to enact its own constitution,[129] a modified Jeffersonian view might allow each generation to interpret the existing Constitution *as if* it had been adopted by that generation, in a way that meets the needs of their time. This view recognizes that any law, including a Constitution, responds to the felt needs and exigencies *of that time*. A modified Jeffersonian argument, then, rests on an understanding of the way the Constitution functioned for the founding generation. Thus, even an argument that rejects history as a method of constitutional interpretation must at least address history in justifying that theory.

To the extent that the public is becoming historically illiterate, a primary source for understanding the Constitution *as written* has been eroded.[130] To have any hope of generating a meaningful constitutional dialogue, we must enhance the general awareness of the Constitution's text and our Nation's history. Yet, what should be included as the essentials of the "Nation's history" is not an uncontested issue. Although we may not fear willful ignorance or deception regarding the nation's official history á là the former Soviet Union,[131] choices about emphasis

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126. Professors Steiker, Levinson, and Balkin undertake such inquiries in their Article. *Id.* at 243-52.

127. *See supra* notes 83-85 and accompanying text.

128. Professor Lawrence Lessig has called this the problem of "translation" of past meaning to present circumstances. Lawrence Lessig, *Understanding Changed Reading: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

129. Letter from Thomas Jefferson to James Madison (Sept. 6, 1739), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON, 1776-1826, at 631-36 (Norton 1995); Letter from Thomas Jefferson to Samuel Kerchval (July 12, 1816), *in* THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 615 (A. Koch & W. Peden eds., 1993).

130. On the public's poor knowledge of U.S. history, see *supra* note 83.

131. *See* DAVID REMNICK, LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE 31-40 (1993); *Soviet History Books to Fill "Blank Spots" for the High Schools*, N.Y. TIMES, Sept. 4, 1988, § 1, at 9 ("Soviet high school students will be given supplements to their history books by the start of next year to fill in the 'blank spots' in the knowledge of their country's past . . . ."). That is not to say that textbooks on American history have not been criticized for omitting or distorting aspects of U.S. history. *See* JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 13-17 (1995).

and inclusion will be contentious.[132] No one said it would be easy.

B. What Can Lawyers Do?

At first, an obvious place to find a solution for the crisis in popular constitutional debate would seem to be the popular media. Yet, the quality of constitutional analysis in these sources is not guaranteed. Consider the following quote in *Newsweek* magazine summarizing the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*:[133]

> Last week the U.S. Supreme Court seemed to scale back the federal government's own affirmative action. By a vote of 5-to-4, the justices fashioned a legal test that will make it very difficult, if not impossible, to preserve government programs that give an edge to minorities and women. The decision in Adarand Constructors v. Pena was written in a murky legalese. But the point was articulated by the plaintiff, Randy Pech, whose Adarand construction outfit in Colorado had lost out to a Hispanic-owned company under a program that earmarked highway contracts for minorities. The burly Pech asked why he should be discriminated against to make up for discrimination that occurred more than a century ago.[134]

Regardless of whether one agrees with the Court's decision in *Adarand*, this quote is rife with misstatements about the case.

First, and perhaps most basic, *Adarand* addressed affirmative action programs based only on race and not gender.[135] Second, the Court did not "fashion" a legal test in *Adarand*. Rather, the Court merely held that the *pre-existing test* that applied to state affirmative action programs should apply to federal government affirmative action programs.[136] Third, the affirmative action program challenged in *Adarand* was not intended to remedy "discrimination that occurred more than

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132. *See, e.g.*, Dan Quayle, *A Case of Political Correctness Gone Wild*, ARIZ. REPUBLIC, Nov. 12, 1995, at G5 (criticizing the National Standards for United States History that the federal government commissioned from the UCLA National Center for History in the Schools as "a case of political correctness gone wild."). Also, the task of formulating a curriculum cannot be value-neutral. *See* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 158 (1995) ("It is simply not possible to eliminate values from education.").

133. 115 S. Ct. 2097 (1995).

134. Evan Thomas et al., *Rethinking the Dream*, NEWSWEEK, June 26, 1995, at 18, 18.

135. Indeed, gender classifications are governed by a separate legal test. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *accord* United States v. Virginia, 116 S. Ct. 2264 (1996).

136. The Court had previously held in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), that state affirmative action programs are subject to strict scrutiny under the Equal Protection Clause.

a century ago"—presumably a reference to slavery.[137] Rather, the law was intended to correct for *current* racial disadvantages in the construction industry.[138] In sum, anyone who relied on *Newsweek* to explain the Court's decision in *Adarand* would have come away sorely misinformed. So, one source that holds hope for educating the public about the Constitution—the popular media—may not always be a reliable source of information.

Perhaps, then, we need writing by constitutional professionals that is aimed at the constitutional layperson. On this point, constitutional professionals should take a lesson from Stephen Jay Gould, Professor of Zoology and Geology at Harvard University. Professor Gould has written several books that make the complexity of science accessible to the layperson. In the Prologue to his book *Bully for Brontosaurus: Reflections in Natural History*, Professor Gould explains why such writing is one of the highest callings in any discipline:

> In France, they call this genre *vulgarisation*—but the implications are entirely positive. In America, we call it "popular (or pop) writing" and its practitioners are dubbed "science writers" even if, like me, they are working scientists who love to share the power and beauty of their field with people in other professions.
>
> In France (and throughout Europe), *vulgarisation* ranks within the highest traditions of humanism, and also enjoys an ancient pedigree—from St. Francis communing with animals to Galileo choosing to write his two great works in Italian, as dialogues between professor and students, and not in the formal Latin of churches and universities. In America, for reasons that I do not understand (and that are truly perverse), such writing for nonscientists lies immured in deprecations—"adulteration," "simplification," "distortion for effect," "grandstanding," "whizbang." I do not deny that many American works deserve these designations—but poor and self-serving items, even in vast majority, do not invalidate a genre. "Romance" fiction has not banished love as a subject for great novelists.[139]

Professor Gould also offers his view of why this bias against popular writing is harmful.

> I deeply deplore the equation of popular writing with pap and distortion for two main reasons. First, such a designation imposes a crushing professional burden on scientists (particularly young scientists without tenure) who might like to try their hand at this expansive style. Second, *it denigrates the intelligence of millions of Americans eager for intellectual stimulation without patronization.* If we writers assume a crushing mean of mediocrity and incomprehension, then not only do we

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137. Thomas et al., *supra* note 134, at 18.

138. *See Adarand*, 115 S. Ct. at 2102-04.

139. STEPHEN JAY GOULD, BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY 11 (1991).

> have contempt for our neighbors, but we also extinguish the light of excellence. The "perceptive and intelligent lay person" is no myth. . . .[140]

Last, Professor Gould says that accessible, popular writing should not require compromise in intellectual integrity. "The rules are simple: no compromises with conceptual richness; no bypassing of ambiguity or ignorance; removal of jargon, of course, but no dumbing down of ideas (*any conceptual complexity can be conveyed in ordinary English*)."[141]

By substituting the words "law" and "lawyer" for "science" and "scientist" in the above quotations, we can see how Professor Gould's words hold true for the legal profession. Specifically, constitutional professionals can aid the cause in two ways. First, legal writing can target general, lay audiences. Books by Professors Robert Bork, Stephen Carter, Lawrence Tribe, and Harry Wellington, to name a few, have made recent efforts along these lines.[142] Also, articles, op-ed pieces, or letters-to-the-editor in newspapers or other periodicals of general circulation serve the same function.[143] These authors do the remarkable service of making constitutional issues accessible to a wide audience while not dumbing down the material.

Unfortunately, the works by the above authors are remarkable because of their rarity. As Professor Gould noted in other fields, popular writing also is not valued in the legal profession. For the practitioner, such writing is not "billable." For the academic, such writing is not of sufficient "scholarly" or "academic" depth to qualify the author for tenure.[144]

For legal academics, their bias against popular legal writing can be traced to the elitism inherent in academia. Professor J.M. Balkin has noted:

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140. *Id.* at 11-12 (emphasis added).

141. *Id.* at 12 (emphasis added).

142. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994); STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990); HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION (1990).

143. *See* Linda S. Eads, *The Abortion Debate: Waiting for Imminent Supreme Court Decision*, DALLAS MORNING NEWS, June 28, 1992, at 1J; Paul Gewirtz, *Who Is Stephen Breyer?*, HARTFORD COURANT, July 24, 1994, at D1; Paul Gewirtz, *Litmus Test for Justices? Legal Views Do Matter*, BALTIMORE EVENING SUN, Apr. 29, 1993, at 19A; Laurence H. Tribe, *Rule of the 27th Amendment Joins the Constitution*, WALL ST. J., May 13, 1992, at A15.

144. Judges Harry Edwards and Richard Posner have argued that such an attitude exists within the academy also toward doctrinal scholarship. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2194-95 (1992); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1117-19 (1981); *see also* KRONMAN, *supra* note 45, at 265 ("Every law teacher belongs to the community of university scholars, and it is to this community that his or her research and writing are primarily addressed.").

> Despite their often egalitarian views, legal academics are socialized into a culture that privileges elite values. After all, like everyone else, academics hope to succeed in their chosen calling; and they need to distinguish themselves by being smarter, by being more learned, and by possessing greater expertise. Thus, saying that legal academics have tendencies towards elitism is like saying that they have tendencies towards breathing oxygen.[145]

And, Professor Balkin suggests that an "encounter with populist values"—values shared by the public at large—"may help [law faculties] balance their natural proclivities."[146] Writing popular legal material could provide just such an opportunity. Unfortunately, however, little incentive currently exists for the writing of popular legal works, such as newspaper and magazine articles, because they are not valued in the promotion and tenure system that most legal academics work within.[147]

And, even the distinguished examples cited above can be inaccessible because of the problem of constitutional illiteracy. For example, none of the above authors, except for Wellington,[148] included a copy of the Constitution in their work for the reader's reference. The reader has no sense of the document as a whole, only of the selected words that the author chooses to quote. The reader is encouraged to take it on faith that the text means what the author says it says—not a good way to encourage independent thinking.

Last, legal scholarship aimed at the layperson must make the case that constitutional literacy is relevant—why it is worth the reader's attention. It is a mark of elitism and extreme arrogance to expect a wide audience to heed your words, rather than persuading the listener why one's words are worth attention. Unlike legal academics—professionals at contemplating their own navels—who tend to find these discussions interesting in themselves, the non-academic must be persuaded to devote scarce time to the author's material. In the language of the litigator, we must make our case. And, if the people ultimately ignore the message, we may have done all we can. For, it is at best unclear whether government—and certainly academics—should prescribe what the general public finds important or worthwhile.[149] We must be good advocates, not cultural czars.

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145. J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1950 (1995) (reviewing CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993)).

146. *Id.*

147. Most tenure writing requirements are stated in terms of scholarly articles published in professional journals and reviews. *See* JULIUS GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION 43-49, 109-10 (1992); Gordan Fellman, *On the Fetishism of Publications and the Secrets Thereof*, ACADEME, Jan.-Feb. 1995, at 26, 26-27.

148. *See* WELLINGTON, *supra* note 142, at 159-80.

149. Professor J.M. Balkin has recently addressed this point in the context of the First Amendment's free speech guarantee. Balkin, *supra* note 145. Stated very simply (perhaps too simply), two currents—populism and progressivism—are prevalent in free speech as well as other

In the end, members of the legal profession—specifically, constitutional professionals—must play a role in improving constitutional literacy. We are the ones with knowledge of the Constitution and training in its interpretation and application; after all, it's our job! And, part of that job should be making our work and its object (the Constitution) accessible to the general public. This will not happen, however, until we recognize that obligation and offer incentives for our fellow constitutional professionals to do so. We must give practicing lawyers a reason to devote time to this cause. For example, states that have a Continuing Legal Education requirement might give CLE credit for legal writing in the popular media, or doing civics presentations for school children. And law schools might consider rewarding faculty who take the time and effort to write non-technical pieces that attempt to educate the public. As the pro bono arena has shown, unless lawyers are enticed with a carrot or threatened with a stick, they are unlikely to alter their behavior in an unselfish direction.

CONCLUSION

Seidman and Tushnet's *Remnants of Belief* has served as a jumping-off-point for this Essay's discussion of constitutional illiteracy. This Essay is more of a call to arms than a set of ready-to-go solutions. Such solutions will only come when the bar and academia recognize the problem and commit themselves to its solution. In the meantime, Seidman and Tushnet's advice—self-awareness and tolerance—will have limited application. Among constitutional professionals, this advice holds promise. In the larger America, however, we first need to put the Constitution back into constitutional argument.

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areas of constitutional law. *See id.* at 1943-44. A central value of populism is the value of and confidence in the opinions of the average American. *See id.* at 1945-47. Progressivism, on the other hand, looks at the unalloyed popular will with suspicion, preferring some form of removed deliberation as a filter for raw public preferences. *See id.* at 1947-48. Balkin points out that academics tend to fall into the progressive mindset, which has a tendency to prescribe what the public *should know* or how the public *should act*. *Id.* at 1951. This Essay does not attempt to resolve the tension between populist and progressive tendencies, and ultimately lies somewhere between them. In a progressive vein, this Essay argues that we *should* value constitutional literacy. In a populist vein, however, this Essay argues that constitutional literacy should not be force-fed, but rather that legal writers should persuade the public to consider their work.

PRIVATE RIGHTS AND PUBLIC WAYS: PROPERTY DISPUTES AND RAILS-TO-TRAILS IN INDIANA

DANAYA C. WRIGHT*

INTRODUCTION

In 1983, Congress expanded the National Trails System Act[1] to promote the conversion of abandoned railroad corridors into hiking and biking trails. By early 1997, there were over 9000 miles of rail trails in the United States.[2] Some of these are well-groomed, paved, multi-use trails in urban and suburban neighborhoods; others are relatively undeveloped, dirt paths along railroad corridors through rural farmland, state parks, and industrial sites. Indiana currently has less than fifty miles of trails, only twenty of which are fully developed, paved trails.[3] In contrast, Minnesota has more than 1100 miles of trails, and Michigan has more than 1000 miles of trails.[4] There is "a big blank spot there in Indiana" as two proposed coast-to-coast trails stop at Indiana's border.[5]

The National Trails System Act "encourage[s] state and local agencies and private organizations to establish appropriate trails" by preserving "established railroad rights-of-way for future reactivation of rail service." Due to the rapid decline of rail service over the last fifty years, the mileage in our nation's rail system has shrunk from more than 270,000 miles at its peak to 141,000 in 1970, with a continuing loss of over 2000 miles of corridor yearly.[6] Realizing that once the corridor is broken up, it would be prohibitively expensive to regain it, Congress has used the Trails Act to promote "railbanking"—the preservation of these corridors for possible future use. But many landowners would like to reacquire the corridor lands that were carved out of their parcels over a century

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1. 16 U.S.C. §§ 1241-1251 (1994 & Supp. I 1995).

2. *See* Rails to Trails Conservancy, *Current Statistics*, (visited July 13, 1997) <http://www.railtrails.org>.

3. *See* Kyle Niederpruem, *Officials Will Seek Input on Use of Recreational Trails in State*, INDIANAPOLIS STAR, July 23, 1993, at B04. To date, only four trails are finished (DeKalb County Trail—seven miles—finished in 1976; Hammond PTA Trail—four miles—finished in 1991; a portion of the Monon Trail—three miles—finished in 1996; and the Prairie Duneland Trail—six miles—finished in 1996). Currently a number of trails are in different stages of development, and this figure will change.

4. *See* Steve Farr, *Derailed: New Trails Movement Encounters Opposition,* FORT WAYNE J. GAZETTE, May 11, 1997, at 16A. *See also* 16 U.S.C. § 1247(d) (Supp. I 1995).

5. *Farr, supra* note 4, at 16A.

6. *See* Charles H. Montange, PRESERVING ABANDONED RAILROAD RIGHTS-OF-WAYS FOR PUBLIC USE: A LEGAL MANUAL RAILS-TO-TRAILS CONSERVANCY 1 (1989).

ago on the theory that termination of rail service extinguished the railroads' property rights in the corridors. As a result, Indiana has become a hotbed of litigation over property rights to discontinued corridors. And although most of the states that have dealt in depth with the legal issues surrounding corridor conversions have ruled in ways that promote the federal railbanking policies, Indiana courts have stubbornly relied on and misapplied thirty- and forty-year-old precedents that do not adequately address the complex legal issues at stake in these cases.

This Article attempts to clarify the muddied legal issues that have, heretofore, stalled trail development, spurred a significant amount of acrimonious litigation, and resulted in a ruling by the supreme court that is not only contrary to basic rules of property law and Indiana legislation, but goes against the general rationale in every other state that has taken the time to consider the issue on the merits.[7] Current lawsuits, including a series of class-action suits by property owners adjacent to these abandoned railroad corridors, are challenging the sale of railroad rights as illegal, unconstitutional takings, and slanders of title. They claim that upon abandonment of railroad services, title to these corridors reverts to the adjoining landowners who, fearing crime and an influx of urban users, want to fence off, shut down, and otherwise halt trail conversions occurring literally in their back yards. And Indiana property law is, unfortunately, not particularly clear or well-developed, leaving attorneys for the trails, the railroads, and adjoining landowners to argue from rules laid down in thirty-year-old cases that did not anticipate the needs and developments of the twenty-first century. Furthermore, as with any area of law governed by federal regulations, Federal and State statutes, common law property doctrines, and arcane rules of property construction, most lawyers have sense enough to stay far away.

It is unfortunate that in a case of tremendous public interest, the Indiana Supreme Court thought fit to bestow a scant four paragraphs of legal analysis on the issue of interpreting railroad deeds.[8] In doing so, the supreme court adopted the misguided and illogical reasoning of the court of appeals.[9] In a case of this importance, the subject properly deserved a thorough analysis of the law and policy reasons that, under the guise of protecting private property, were completely ignored. I urge the court to reconsider this case in the hope that a more careful attention to the precedent being set and the application of well-settled, basic property-law principles will result in a decision that protects the property rights of

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7. *See, e.g.*, Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545 (1997); City of Manhattan Beach v. Los Angeles Superior Court, 914 P.2d 160 (Cal.), *cert. denied*, 117 S. Ct. 511 (1996); McKinley v. Waterloo R.R., 368 N.W.2d 131 (Iowa 1985); Brown v. State, 924 P.2d 908 (Wash. 1996).

8. Consolidated Rail Corp. v. Lewellen, No. 54S01-9706-CV368, 1997 WL 335018, at *2-3 (Ind. June 19, 1997). *Compare Chevy Chase Land Co.*, 37 Fed. Cl. at 564-75 (devoting twelve pages to analyzing the legal issues of deed construction); *City of Manhattan Beach*, 914 P.2d at 164-79 (devoting over fifteen pages to interpreting ambiguous railroad deed).

9. Consolidated Rail Corp. v. Lewellen, 666 N.E.2d 958 (Ind. Ct. App. 1996), *aff'd*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997).

all parties, including the railroads, not just the questionable claims of a noisy few. The property law issues are relatively straightforward once we are able to move beyond the confusing legacy of nineteenth-century railroad practices and title documents.

I. HISTORY OF RAILROAD DEVELOPMENT

In the nineteenth century, many states passed laws giving the railroads plenary powers to condemn private land for railroad use. Railroad use included laying tracks and operating stations, turnabouts, and switches.[10] Unfortunately, the railroads did not always act as conscientious partners in land and economic development. Some, armed with the power to condemn, mapped out the most convenient line from point A to point B without regard for preexisting property boundaries, drew up form deeds which had blanks for the price and property description, and began knocking on doors. Landowners were given a choice, either to sell the land or to have it taken under eminent domain. As a result, many landowners accepted whatever sums were offered and executed form deeds that the railroad representatives pulled out of their briefcases. Many of these deeds are ambiguous by today's standards, using language of purchase appropriate to fee simple deeds ("warrant and convey"), but sometimes mentioning rights-of-way, easements, reversions, or other words of limitation ("for railroad purposes only"). Worse, whether this really occurred has become irrelevant in light of our current legacy of anti-railroad animus that has cast a dark cloud over what are otherwise straightforward issues of property rights and deed construction.

The railroads could not take title to the land for free, however. They had to purchase whatever property rights they acquired and would pay more for fee simple title to the land than for access or drainage rights, though these were often included in the sales price.[11] If a landowner objected to the price offered by the railroad, he or she could request an independent appraisal by three "disinterested freeholders of such county to appraise the damages which the owner of the land

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10. In 1852, Indiana enacted a statute giving railroads the right to condemn land for railroad uses. 1 REV. STAT. ch. 83, §§ 14-15 (1852) (codified as amended at IND. CODE §§ 8-4-1-15 to -16 (1993)). They were explicitly given the power to acquire rights-of-way to access and maintain their tracks and to construct drainage culverts. *Id.* § 15. These lesser rights are included in the statute as incidental to their property rights. Before 1852, railroads sought individual charters to enable them to acquire the necessary property.

11. Many people seem appalled by the sight of railroad deeds that paid a landowner anywhere from $50 to $200 for the land across their farms. But to put these values into perspective, the average value of an acre of farmland in 1870 was $28, in 1880 was $31, in 1890 was $37, in 1900 was $39, and in 1910 was $75. And when we consider that it takes a little over twelve acres to comprise a one-mile stretch of corridor at the average width of 100 feet, payments to landowners in excess of the fair market value of the land actually taken indicate that the railroads believed they were purchasing significant property rights. *See* INDIANA CROP & LIVESTOCK REPORTING SERVICE, HISTORIC CROP SUMMARY, 1866-1969, at 142 (1974) (citing ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., FARM REAL ESTATE DEVELOPMENTS).

may sustain by such appropriation."[12] If the parties still could not come to an agreement, the railroad could effectively force a conveyance by paying the appraiser's price and obtaining from the circuit court an instrument of appropriation. In any event, the landowners were free to negotiate for any limitations on the railroad's property interests by, for instance, granting only an easement or a defeasible fee that would revert back to the grantor upon discontinuation of railway service. In many cases the landowners were delighted when the railroads came through as they now had ready access to the large urban markets of Chicago, Boston, and New York.

In an effort to stem the railroads' power, and possibly in response to a particularly strident railroad campaign in 1902 and 1903, the Indiana Legislature passed the 1905 Condemnation Act, which provided that where a railroad acquires a right of way by condemnation, it may not acquire fee simple title.[13] This Act only affected the railroad's eminent domain powers; it did not alter property rights actually negotiated by the railroads and landowners that resulted in a conveyance.[14] The 1905 Act was a turning point in the railroads' expansive powers, and was an attempt to increase the bargaining power of local property owners.[15]

After World War I, the railroad industry was facing a crisis; weak links in the array of smaller lines prevented the coordination and support necessary to serve the needs of a national market. Consequently, Congress passed the Transportation Act of 1920[16] which granted the Interstate Commerce Commission (ICC)[17] the authority to regulate construction, operation, and abandonment of railroad lines. By thinking nationally rather than locally, the industry consolidated and abandoned lines in an effort to survive the stiff competition from trucking that began in the early 1930s.[18] Ironically, many landowners who now rely on

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12. IND. CODE § 8-4-1-16(e) (1993).

13. Act of Feb. 27, 1905, ch. 48, § 1, 1905 Ind. Acts 59, 59-60, (codified as amended at IND. CODE § 32-11-1-1 (1993)). It is interesting to note that use of the term, right-of-way, by the legislature in this Act refers to the strip of land and not to a legal easement. *See infra* notes 76-79 and accompanying text.

14. *See* McKinley v. Waterloo R.R., 368 N.W.2d 131, 135 (Iowa 1985) (distinguishing interests created by condemnation and those created by deed).

15. It can be argued, however, that post-1905 deeds should be strictly construed against the adjoining landowners because local property owners had the power to limit the railroad's interests to easements. Thus, where a deed arguably conveys a fee simple, the courts should protect the railroad's interests because it negotiated for more than the standard claim. In many cases, they paid the same amount for an easement in 1906 that they would have paid for fee simple title in 1904.

16. ch. 91, § 402, 41 Stat. 474, 477-78 (1920) (current version at 49 U.S.C. § 10903 (Supp. I 1995)).

17. In 1996, the ICC ceased to exist, and its duties were transferred to the Surface Transportation Board which is part of the Department of Transportation. ICC Termination Act of 1995, Pub. L. No. 104-88, §§ 101-102, 109 Stat. 803, 804-852 (1995) (codified at 49 U.S.C. §§ 10101-11908 (Supp. I 1995)). For ease of reference, however, I will continue to refer to the ICC as the governing body.

18. *See generally* Dennis McKinney, *A Railroad Ran Through It*, *in* INDIANA CONTINUING

arguments that the railbeds have been abandoned, opposed abandonment of the local lines that ran through their land when the railroads tried to discontinue certain lines in order to maximize profits.

By the 1970s, the nation faced extensive losses in its rail system from abandonment and reversion of the corridors back to prior landowners. To help preserve these railroad corridors for possible future reactivation, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, which explicitly prescribed the preservation of "abandoned" railroad corridors for public uses.[19] This Act also authorized the ICC to delay finalizing abandonment proceedings unless the property had first been offered for sale for public purposes, including trail use.[20] However, because this Act provided little incentive to the railroads to work with public groups trying to save the corridors, and because the administrative procedures proved cumbersome to local trail advocates and governmental entities like parks departments and natural resources boards, Congress gave the ICC the power to enforce a sale under reasonable terms.[21] The National Trails System Act (NTSA) Amendments of 1983[22] further allowed the ICC to deny abandonment authorization to railroads and issue certificates of interim trail use that would forestall the application of state law property rights. In particular, the NTSA provides that "in the case of interim use of any established railroad rights-of-way . . . if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."[23] The effect of the NTSA is to preempt application of state property laws that would otherwise determine property interests in railroad corridors upon abandonment of rail services.

In most states, including Indiana, abandonment triggers a state law analysis wherein corridors owned as easements, rights-of-way, or reversionary future interests determine, and the land reverts to the original grantor's successors in interest or the adjoining property owners, and corridors owned by the railroads in fee simple are deemed fully transferable by the railroads.[24] This leads to a messy and often difficult analysis of the language of nineteenth-century deeds, grantors' intent, and state legislation regarding trail conversions and rail abandonment.

LEGAL EDUCATION FORUM, STAYING ON THE CUTTING EDGE: THIRD ANNUAL REAL ESTATE SYMPOSIUM, (1995); Samuel H. Morgan, *Rails to Trails: On the Right Track*, 8 PROB. & PROP. 10, (1994); Steven R. Wild, *A History of Railroad Abandonments,* 23 TRANSP. L. J. 1 (1995).

19. Pub. L. No. 94-210, § 802, 90 Stat. 31, 127-30 (current version at 49 U.S.C. § 10905 (Supp. I 1995)).

20. *Id.*

21. *See* 49 U.S.C. § 10907(b)(1) (Supp. I 1995). The ICC could only force a sale to an entity that planned to continue offering rail services. It could not force a sale for a trail conversion.

22. Pub. L. No. 98-11, §§ 201-207, 97 Stat. 42, 42-50 (codified as amended at 16 U.S.C. §§ 1241-1251 (1994 & Supp. I 1995)).

23. 16 U.S.C. § 1247(d) (Supp. I 1995).

24. Under certain circumstances the reversionary interest holder may be someone other than the adjoining property owner.

Hence, it is important for trail organizers to negotiate with the railroads before an ICC abandonment certificate has been granted; otherwise, the federal preemptive powers of the NTSA may be inapplicable, and title will become purely a question of state law. That appears to be the situation in a number of Indiana cases.[25] But even if a line has been abandoned and the deeds are ambiguous, Indiana law supports the premise that the ambiguities should be interpreted in favor of the railroads and the trail conversions for a variety of legal and policy reasons.

II. ABANDONMENT OF RAIL SERVICE

The first determination to be made is whether or not a railroad has abandoned its line. After 1920 the clearest evidence of abandonment is a certificate of abandonment issued by the ICC. This certificate authorizes discontinuation of services and the removal of track. Prior to 1983, a certificate of abandonment was construed under most states' laws to divest the railroad of any easements or rights-of-way that were not fee simple interests.[26] Under the NTSA, an abandonment certificate could include an interim trail use provision which would allow discontinuation of railroad services but would not constitute abandonment for state reversionary purposes. This Notice of Interim Trail Use (NITU) provides for a 180-day stay during which trail advocates can negotiate sales of the corridor directly with the railroad. If no negotiation has occurred by the end of the 180 days and no extension has been requested, the interim trail use certificate automatically converts into a certificate of abandonment. But if a sale has occurred, under the NTSA, such interim use will not be considered abandonment and state property laws will not be triggered.[27]

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25. *See* Fritsch v. ICC, 59 F.3d 248, 313 (D.C. Cir. 1995); Victor Oolitic Stone Co., Inc. v. CSX Transp., Inc., 852 F. Supp. 721 (S.D. Ind. 1994); Tazian v. Cline, 673 N.E.2d 485 (Ind. Ct. App. 1996); Consolidated Rail Corp. v. Lewellen, 666 N.E.2d 958 (Ind. Ct. App. 1996), *aff'd*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997); CSX Transp., Inc. v. Clark, 646 N.E.2d 1003 (Ind. Ct. App. 1995); Friends of the Pumpkinvine Nature Trail, Inc. v. Eldridge, No. 20D03-9401-CP-009 (Ind., Elkhart Super. Ct. No. 3) (Sept. 2, 1994) (order granting partial summary judgment).

26. For example, in Pennsylvania, there can be no abandonment of property rights until the ICC (or now the STB) formally authorizes abandonment. Palm Corp. v. Pennsylvania Dep't of Transp., 688 A.2d 251, 253 n.7 (Pa. Commw. Ct. 1997); Quarry Office Park Assocs. v. Philadelphia Elec. Co., 576 A.2d 358, 363 (Pa. Super. 1990) (issuance of ICC certificate only evidence of abandonment). *See also* Washington Wildlife Preservation, Inc. v. Minnesota, 329 N.W.2d 543, 548 (Minn. 1983) (issuance of ICC certificate does not necessarily indicate an intention to abandon). *See also infra* notes 39-45 and accompanying text for a discussion concerning whether ICC power to regulate abandonment pertains to railroad services only, or to those services *and* underlying property rights.

27. Although the ICC has formulated a nice procedure for authorizing railroad conversions to trails, few of us know when railroads are about to seek abandonment certificates, can locate adequate money and legal resources on short notice in order to purchase many miles of corridor land and do not have a governmental infrastructure capable of developing a rails-to-trails plan

A number of important cases have dealt with the NTSA and the ICC's plenary powers over abandonment. In the most important, *Preseault v. ICC*,[28] the Supreme Court ruled that Congress did have adequate powers under the Commerce Clause to deem "interim trail use to be like discontinuance rather than abandonment."[29] The Court noted that Congress intended "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use."[30] This intent passed the rational basis test for activities that affect interstate commerce. Hence, the preemption of state law reversionary rights, in the context of railbanking and interim trail use, was deemed a valid exercise of Congressional power and therefore superior to any state law. The Preseaults also claimed that the federal preemption of their reversionary interests constituted a taking, but the Supreme Court noted that a takings claim was premature and referred the Preseaults to a Tucker Act remedy in the Court of Claims.[31]

But despite well-laid plans, the 180-day negotiation period can prove too short given the needs of trail organizers to locate funds, contact railroad authorities, and perhaps engage in public meetings and referendums.[32] In a blow to Indiana trail organizers, negotiations between CSX and the Monroe County Parks and Recreation Department (MCPRD) were frustrated by a strict interpretation of the ICC's abandonment powers. In *Fritsch v. ICC*,[33] CSX filed a Notice of Exemption seeking authorization in late January, 1993, to abandon a rail line that it had operated between Bloomington and Bedford. The rail line had been out of service since 1987, but the railroad did not request an abandonment certificate until 1993.[34] Seven days later the MCPRD filed a request with the ICC for a

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within the time limit of 180 days set by the ICC. As a result, many lines have been abandoned for years that are only now being considered for possible trail conversion. In such a case, trail organizers must rely on state law doctrines to determine the property rights of the different parties. Fortunately, in 1995 the Indiana General Assembly established a Transportation Corridor Planning Board. One of its duties is to keep track of these potential corridors and notify interested parties when abandonment proceedings have been filed. *See* IND. CODE §§ 8-4.5-2-1 to -10 (Supp. 1996).

28. 494 U.S. 1 (1990).

29. *Id.* at 8.

30. *Id.* at 18 (citing H.R. REP. NO. 98-28, at 8 (1983) *reprinted in* 1983 U.S.C.C.A.N. 112, 119. S. REP. NO. 98-1, at 9 (1983)).

31. *See* Preseault v. United States, 27 Fed. Cl. 69 (1992), *rev'd en banc,* 100 F.3d 1525 (Fed. Cir. 1996).

32. In a case that took two years of negotiations between railroad authorities and trail advocates to reach an agreement, the Ninth Circuit apparently did not question the delays in negotiation or in the conversion of the interim trail use certificate into one for abandonment when it dismissed the reversionary property claimants' suit in *Dave v. Rails-to-Trails Conservancy*, 79 F.3d 940 (9th Cir. 1996). *See also* Grantwood Village v. Missouri Pac. R.R., 95 F.3d 654 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1082 (1997) (discussing legality of ICC extensions on the 180-day negotiations period).

33. 59 F.3d 248 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1262 (1996).

34. This seems to be a common protocol for many of these railroads. They may have

public use condition. Fourteen days after that the ICC issued a notice of exemption authorizing abandonment that would be effective thirty days later, noting that "[e]nvironmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision."[35] Seventeen days later, CSX requested additional time to negotiate a trails-use agreement, but on March 16 it changed its mind and informed the ICC that it had decided not to agree to a conversion. The thirty days were now up, and two days later, on March 18, the Commission issued a decision permitting the abandonment, but imposing a public use condition under 49 U.S.C. § 10905. The next day CSX notified the ICC by letter that it had "abandoned" the line. Nearly six months later the MCPRD wrote to the ICC that it had reached an agreement with CSX to acquire a portion of the rail corridor for trail use. CSX confirmed MCPRD's position on the day the public use condition expired and asked the ICC to issue a Notice of Interim Trail Use (NITU). The ICC issued an NITU imposing the interim trail use condition. One month later the petitioners, adjacent landowners, filed suit claiming that CSX had abandoned on March 19, 1993, that the ICC therefore had no jurisdiction to impose trail use conditions, and that the corridor easements were extinguished.[36]

The D.C. Circuit ruled that once full abandonment had occurred, the ICC could not later impose a trail use condition. Abandonment, it ruled, "is a question of the carrier's intent."[37] Because the ICC had issued an abandonment certificate on March 18 and CSX manifested its intent to abandon by letter on March 19, the court ruled that the 180-day stay was inconsistent with official abandonment which terminated the ICC's jurisdiction to impose the trail use condition. What makes this case problematic is the court's narrow distinction between a 180-day condition imposed on abandonment (meaning abandonment would occur after the 180 days) which was fully within the powers contemplated by 49 U.S.C. § 10905, and a 180-day stay as part of abandonment or post abandonment. For at that magical moment of abandonment, the ICC's power to enforce the 180-day stay and the NITU had ceased.

This distinction is particularly troubling in light of the court's reliance on intent as the crux of abandonment. CSX's letter on March 19, 1993, stating it had abandoned the line became the focal point for the court. The other indicia of

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discontinued services many years before applying for an ICC certificate. Such behavior raises questions about which factors the courts should consider in determining abandonment. *See infra* notes 133-45 and accompanying text.

35. *Fritsch*, 59 F.3d at 250.

36. The adjacent landowners had sued CSX to quiet title to the corridor in themselves, slander of title, and injunctive relief based on a taking of private property. The court dismissed the suit on the grounds that the ICC abandonment certificate and notice of interim trail use precluded counts one and two, and that under *Preseault*, their property interest was too speculative for consideration of their constitutional claim. Victor Oolitic Stone Co. v. CSX Transp., Inc., 852 F. Supp. 721 (S.D. Ind. 1994).

37. *Fritsch*, 59 F.3d at 253. *See also* Birt v. Surface Transp. Bd., 98 F.3d 644 (D.C. Cir. 1996) (ruling, under nearly identical facts, against a finding of abandonment).

abandonment, stopping service and removal of track and signal lines and poles, occurred both before and after that date. Thus, to fix March 19 as the irrevocable date of abandonment for a process that can take months and even years, will ultimately frustrate the congressional goals of railbanking and trail use, and create a rule that draws a questionable distinction between the power to impose conditions before abandonment and the power to impose conditions as a part of the abandonment. The latter, according to the court, is inconsistent with the termination of jurisdiction implicated by abandonment proceedings.

The reasoning in *Fritsch* was questioned in two later cases dealing with the dual nature of abandonment: receipt of an abandonment certificate and what has come to be called "consummation" of abandonment. The latter is seen as an independent analysis of the railroad's intent to abandon, which is gleaned from such independent evidence as: "cessation of operations, cancellation of tariffs, salvage of the track and track materials, and *relinquishment of control over the right-of-way.*"[38] The *Birt* court reasoned that on-going negotiations with a trail-use group evinced a clear intent not to abandon, despite written letters referring to the railroad's actions as "abandonment."[39]

Although state property laws often refer to ICC abandonment for reversionary property interests, there are really two distinct processes going on.[40] Arguably, the ICC's interest in abandonment is purely a question of discontinuing railroad services.[41] This is evidenced by the ICC's determination being premised on a balancing of the public convenience and necessity with the needs of interstate commerce. Thus, it is essentially a "public interest evaluation."[42] Under common law easement and property doctrines, non-use of an easement will only extinguish the easement if there is an additional showing of "intent to abandon" the property interest.[43] One of my arguments later in this Article draws on the distinction between abandonment of service through ICC procedures and abandonment of the underlying property interest. I would suggest that courts be more sensitive to this distinction by recognizing that an ICC certificate of abandonment should be only one factor to consider in determining whether the railroad's underlying property rights have also been abandoned.[44]

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38. *Birt*, 90 F.3d at 585. (emphasis added). There is, arguably, a potential Catch-22 if abandonment per federal law is premised on termination of state property rights, and state property rights are premised on federal abandonment. One thing seems relatively clear: without ICC abandonment there can be no state law abandonment, but ICC abandonment does not necessarily constitute state law abandonment.

39. *See also* Grantwood Village v. Missouri Pac. R.R., 95 F.3d 654 (8th Cir. 1996).

40. *See* Barney v. Burlington N. R.R., 490 N.W.2d 726, 731 (S.D. 1992) (distinguishing abandonment for ICC purposes and abandonment in general).

41. *See id.*

42. Wild, *supra* note 18, at 8.

43. *See* CUNNINGHAM ET AL., THE LAW OF PROPERTY, § 8.12, at 465 (2d ed. 1993).

44. On December 24, 1996, the Surface Transportation Board (STB) issued amendments to the Rules and Regulations governing abandonment and discontinuance of rail lines, effective January 23, 1997. 49 C.F.R. §§ 1152.1-1152.60 (1997). These new rules do not materially alter

After *Fritsch*, it is important that railroads and trail advocates distinguish between three separate legal acts: an intent to discontinue service or relieve itself of liability for taxes or other duties, official abandonment as granted by the ICC, and intent to abandon the property interests under state law. The *Fritsch* court did acknowledge the power of the ICC to condition an abandonment certificate on a 180-day negotiations period so long as the railroad is participating in the negotiations. Unfortunately, the courts, the railroads, and the ICC have not made a clear distinction between a railroad discontinuing service and selling its corridor, which constitutes abandonment by the railroad and relief of its liabilities and duties, and the NTSA's preemption and redefinition of that action as discontinuance so as not to trigger state reversionary laws.[45] Both are a discontinuance of railroad service, but one is labeled abandonment and the other a discontinuance for preempting state property laws.[46] It is not entirely clear that the ICC's abandonment procedure, which principally governs railroad services, should be a determinant under state law for termination of property rights.

But after a clear finding of abandonment, as in the CSX corridor, is the trail

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abandonment and discontinuance procedures and power except in the following ways: The department now requires that a railroad submit a "Notice of Consummation" within one year of receipt of their certificate of abandonment, or the certificate expires, and the authority to abandon ceases. *Id.* § 1152.29 (e)(2). This new requirement is an attempt to reconcile *Fritsch* with the cases that have distinguished it. The Board wishes to prevent the confusion that arose in *Fritsch* where the issue of consummation of abandonment turned on a variety of factors and actions evidencing intent to abandon. As the Board noted: "The courts . . . have expressly declined to read *Fritsch* as holding that abandonment is necessarily triggered upon a showing of any single piece of evidence indicative of an intent to abandon." 61 Fed. Reg. 67879-80 (1996). *See Grantwood Village*, 95 F.3d at 659 (8th Cir. 1996); Consolidated Rail Corp. v. Surface Transp. Bd., 93 F.3d 793, 799 (D.C. Cir. 1996); *Birt*, 90 F.3d at 588 (D.C. Cir. 1996). "Moreover, the court in *Fritsch* essentially viewed the railroad's letters to the ICC . . . as conclusive evidence that abandonment had been consummated . . . . Thus, our adoption of a notice of consummation requirement here will codify that portion of the court's ruling in *Fritsch* and prevent similar disputes from arising in the future." 61 Fed. Reg. 67879-80 (1996). The effect of this change is to condition abandonment on two events: issuance of a certificate and consummation within one year. If consummation does not occur, the certificate expires, and the STB's authority to regulate is reinstated. The Rules also extend the time for filing public use requests from 30 days to 45 days. 49 C.F.R. § 1152.26(a).

45. Whether the corridor reverts or is converted to a trail, the railroad's actions and intent are the same—to discontinue service and give up all interests in the corridor. But whether that action is deemed a discontinuance or an abandonment is a function of federal law. Thus, it makes no sense in light of the NTSA and the ICC's plenary powers to use the railroad's intent as the criterion for invoking federal preemptive powers.

46. It is especially problematic that the *Fritsch* court focused on the timing of the ICC's abandonment/discontinuance determinations rather than the substantive power to label the same activity either one or the other. Because the railroad's underlying activity is the same, and the ICC clearly has the power to label that activity as an abandonment or a discontinuance, the ICC should arguably have the power to change the label within a reasonable time period, i.e., the statutory 180-day period.

dead? No. As mentioned above, if the ICC grants an interim trail use certificate in place of a certificate of abandonment, the railroad may sell whatever property rights it had in the rail corridor to a trail group, governmental entity, or parks department with no reference to state law.[47] However, if ICC abandonment has already occurred, either through prior ICC action or delays and errors in ICC application procedures, one must turn to analysis under state property law to determine what legal significance will be given to the federal abandonment certificate. Some states provide legislative definitions of abandonment for property rights purposes that might include removal of track, discontinuance of services, failure to pay real estate taxes, sale of property rights, or a combination of the above. Or, in the absence of legislation, the common law definition of abandonment will be applied, generally the railroad's "intent to abandon."[48]

In 1995, the Indiana Legislature passed a comprehensive statute to regulate the property rights associated with railroad abandonments.[49] The legislation defines abandonment (after 1920) as: 1) an ICC certificate of abandonment *and*, 2) either the removal of rails, switches, ties, and other facilities, *or* ten years since issuance of the ICC certificate of abandonment.[50] The statute also provides that a railroad right-of-way will not be considered abandoned if the ICC imposes on it a trail use condition.[51] In the *Fritsch* case, therefore, CSX and the trail advocates could argue that despite the ICC's issuance of a certificate of abandonment, the railroad corridor was not abandoned under Indiana state law until removal of the tracks, rails, switches, and other facilities because CSX had not fully manifested its intent to abandon. Until abandonment under Indiana law, CSX could transfer its rights and interests in the corridor without triggering any state property rights.[52]

In sum, if there has been no abandonment by a railroad under state property law, the railroad can lease or sell whatever rights it has in the corridor regardless of the interests of adjoining landowners. Because the reversionary rights are triggered only upon abandonment, and an official definition of abandonment exists, only those actions that meet the definition of abandonment will suffice to trigger the state property law. One principal consideration in whether or not a railroad has abandoned is whether it has continued to pay property taxes for the

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47. *See* 49 C.F.R. § 1152.29; Washington Wildlife Preservation, Inc. v. Minnesota, 329 N.W.2d 543 (Minn. 1983).

48. New York, for example, has created statutory rules for determining abandonment. *See* N.Y. TRANSP. LAW § 18(2) (McKinney 1993).

49. IND. CODE § 32-5-12-1 to -15 (Supp. 1996) (replacing IND. CODE § 8-4-35-4 (1993) (repealed 1995)).

50. *Id.* § 32-5-12-6 (a)(2). The statute does not explain what happens if a railroad has an ICC certificate of abandonment but has left its tracks in place. Its status during those 10 years would presumably preclude a finding of abandonment and hence stay any reversionary property interests.

51. *Id.* § 32-5-12-7.

52. To date, there has been no judicial interpretation of this state railbanking statute or the abandonment definition, but it appears to provide a stricter definition of abandonment than mere intent to abandon or an ICC certificate.

corridors in question. In many cases, the railroads continue to pay taxes even after discontinuing rail services so as to retain whatever property interests they may have to the underlying land.[53] But if abandonment has occurred, then federal preemptive power to postpone state property law provisions ends, and we must then undertake an analysis of the respective property rights pursuant to state law.

III. Title Under State Property Law

The second issue to be resolved is the nature of the railroad's title to the land under its tracks, which, in Indiana, is purely a matter of state law. The law in Indiana is quite clear that where the railroad owns fee simple title to the land, abandonment of rail services has no effect on its property rights, which it may convey to trail groups or governmental entities without consideration for the wishes of adjoining property owners property owners. If, however, the railroad only owns an easement or right-of-way to the land, then abandonment of rail service *may* extinguish the easement.[54] Unfortunately, many of the parties involved in these railroad conversion cases have occluded the relatively simple property analysis because of a general dislike for the often arcane and seemingly complex rules of future interests. So let me explain the three-step process that must be undertaken to determine who has title to the corridor property following a discontinuation of service by the railroad.

We must first determine what kind of property interest the railroad originally acquired either by deed or by an instrument of appropriation. To do so, we look first to the intentions of the grantors, who had three possible types of interest they could convey to the railroads. The first is a fee simple absolute; the second is a defeasible fee (with a reversion or right of reentry to the grantor upon the happening of an enumerated condition), and the third is an easement. If the deed is ambiguous, we must interpret the deed by applying certain straightforward rules of construction, which entails a judicial determination that the railroad's interest falls into one of these three categories. If the deed is clear and unambiguous, we can easily identify the nature of the railroad's interest and move on to the second step. Thus, we must first determine the railroad's interest, which will, ipso facto, fall into one of these three categories.

The second step, once we know the railroad's property right, is to determine who *now* holds that right. Presumably, a successor railroad or a trail group will have acquired the railroad's interests through a series of easily traced quitclaim deeds. Additionally, we must determine at this stage who *now* holds the property interests of the original grantor. As I discuss below, however, it is not always clear

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53. It is often difficult to tell exactly who is paying the property taxes because the railroads are taxed on the basis of their statewide services and their assessments are not divided up according to each separate piece of property. Payment of taxes by a railroad should militate strongly against a finding of abandonment as far as state law is concerned.

54. For a thorough analysis of the different states' approaches to interpreting ambiguous railroad deeds, see Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3D 973 (1966 & Supp. 1996) and cases cited *supra* note 8.

who owns all the different interests originally held by the grantor.

And the third step, once we have determined the interests of all parties to the corridor land, is to determine what effect, if any, occurs from the railroad's discontinuation of services, abandonment certificate, or consummation of abandonment under state law. We reach this third analysis *only* if the first analysis tells us that the railroad's interest was a mere easement. If it was a fee simple or a defeasible fee, we can stop with step two, and the trail conversion may continue unimpeded by claims of adjacent landowners.

1. Step One: What Is the Railroad's Original Interest?—In determining the railroad's interest, there are four types of deeds we might encounter: clear grants of a fee simple absolute, a defeasible fee, an easement, or an ambiguous deed that will be determined to fall into one of these three categories. I will discuss all four and the kinds of language we are likely to encounter, along with the relevant rules of construction to aid us in interpreting which kind of grant was most likely the intention of the grantor.

The first deed is a clear grant of a fee simple absolute. Fee simple absolute is the most complete and comprehensive right to a piece of real estate that is recognized under our law. Fee simple includes all rights to use, limit, or alienate the property consistent with the laws of nuisance, zoning, and alienation. In that case, the deed would use standard language in the granting clause ("convey and warrant") with perhaps other clear indications that a fee simple was intended by such terms as: "granted in fee simple," "to the railroad forever," "with no limitations," and so forth. Also, there would be no confusing limitations in the habendum clause, like "railroad use only" or "right-of-way." Such was the situation in *Tazian v. Cline*,[55] in which the court found that an 1873 deed to the Fort Wayne Railroad Co. conveyed a fee simple. The deed stated:

> said parties of the first part, in consideration of five hundred dollars, . . . do grant and convey and warrant to the party of the second part . . . a strip of land fifty feet in width on West side of railroad over, across, and through the following described tract of land . . . forever for the uses and purposes therein expressed.[56]

The Tazians contended that the phrase, "for the uses and purposes therein expressed" constituted a limitation which should be read as analogous to the term right-of-way which would imply that the conveyance was of an easement only. The court of appeals disagreed, citing the rule of *Claridge v. Phelps*[57] that "when the granting clause of a deed is general or indefinite respecting the estate in the lands conveyed, it may be defined, qualified, and controlled by the habendum."[58] But, if the granting clause is not ambiguous, then the habendum clause does not defeat the grant. In *Tazian*, the court's reluctance to give any credence to the

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55. 673 N.E.2d 485 (Ind. Ct. App. 1996). *See also* Sowers v. Illinois Cent. Gulf R.R., 503 N.E.2d 1082 (Ill. App. Ct. 1987) (holding similar deed to convey a fee simple).

56. *Tazian*, 673 N.E.2d at 487.

57. 11 N.E.2d 503 (Ind. App. 1937).

58. *Id.* at 504.

limitation in the habendum clause comports with general rules of construction that hold that the presumption against forfeitures leads to nullification of ambiguous limitations that are not accompanied by clear terms of reversion or transfer if the limitation is violated.[59] In any event, where a railroad owns a fee simple interest in the railbed land, it may convey or lease it without notice or consideration to adjoining landowners, and subject only to general laws on nuisance and zoning.

The second type of deed one may encounter grants what is called a defeasible fee.[60] A defeasible fee is fee simple title that carries with it a limitation or a condition on the land's use, a violation of which results in reversion of the land back to the grantor or a right of reentry. A defeasible fee is generally used when grantors convey property for specific, enumerated purposes. But before a court will find that a deed conveyed a defeasible fee, the deed must use explicit language spelling out the conditions or limitations on the use *and* what would occur in the event of a violation. Thus, a clear grant of a defeasible fee would use the same language in the granting clause of a fee simple absolute, such as "convey and warrant" or "granted in fee simple." But in the habendum clause would appear clear language of limitation and reverter. For instance, it would "convey and warrant" a said piece of property, "for railroad purposes only" or "only so long as a railroad operates on the land." And it would explain what might happen when railroad service ceases: "If the railroad ceases operations, the land will revert back to me" or "If the land is no longer used for railway purposes, it will be deemed to have been abandoned, and the grantor, or his heirs, will have a right to re-enter and take back the land." A defeasible fee was clearly conveyed in *Bruch v. Centerview Community Church, Inc.*,[61] by a deed that stated: "[grantors] convey and warrant to [grantees] as long as used for church purposes, when not used as church purposes said property reverts back to [grantors]."[62]

There is a standard rule of property law that provides for a presumption against forfeitures. Because it can be very disruptive when well-established property interests are canceled or forfeited, courts require that any conditions and limitations on the use be clear and explicit and that the conveyance clearly spell out where the land goes in case of forfeiture. Thus, if the railroad acquires a defeasible fee, the original grantor will retain what is called a possibility of

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59. *See* Idaho v. Hodel, 814 F.2d 1288, 1292 (9th Cir. 1987) ("[Forfeiture] provisions are construed liberally in favor of the holder of the estate, and a construction which avoids forfeiture must be adopted if at all possible."); Wood v. Board of County Comm'rs, 759 P.2d 1250 (Wyo. 1988). The Indiana Supreme Court in *Lewellen* violated this principle. In *Lewellen*, the deed recited a conveyance of land. Consolidated Rail Corp. v. Lewellen, No. 54S01-9706-CV-368, 1997 WL 335018, at *1-2 (Ind. June 19, 1997). The court read that provision right out of the deed.

60. *See generally* CUNNINGHAM ET AL., *supra* note 43, § 2.3.

61. 379 N.E.2d 508 (Ind. App. 1978).

62. *Id.* at 509. *See also* City of Manhattan Beach v. Los Angeles Superior Court, 914 P.2d 160, 168 (Cal.), *cert. denied*, 117 S. Ct. 511 (1996) (fee simple absolute not defeated by a clause declaring the purpose especially where the purpose will not inure to benefit of the grantor but rather to the public); McKinley v. Waterloo R.R., 368 N.W.2d 131 (Iowa 1985) (finding a railroad deed conveyed a fee simple subject to executory limitation that was extinguished by statute).

reverter which is a future interest in the land. However, all states, including Indiana, have Marketable Title Acts[63] that extinguish these contingent future interests if they are not periodically recorded. In Indiana, reversionary interests are extinguished after fifty years if they are not kept alive by recording at the county courthouse, and the defeasible fee is converted into a fee simple absolute. Hence, any deed conveying a defeasible fee to the railroad will most likely be converted into a fee simple absolute by operation of law if the original grantor, or his successors, did not record their future reversionary interest.

The third type of deed one might encounter is a clear, unambiguous grant of an easement or a mere right of use over the land in question. An easement is generally created by using different language in the granting clause, such as "grant," "release," or "reserve" and explicitly describing the interest in the habendum clause as an "easement" or a "right-of-way." This was the situation in a number of recent Indiana cases. In *Richard S. Brunt Trust v. Plantz*,[64] the court interpreted the following deed to convey an easement only: "I, ___, do hereby release and quitclaim to ___ . . .the right of way, for railroad purposes only, for such railroad described as follows, to wit: . . . ."[65] In *Lake County Trust Co. v. Lane*,[66] the court interpreted the following deed to convey an easement only: "various parties quit claim deeds conveying to said _____, in trust for such railroad company or companies . . . a right of way for such a railroad as in each of said quit claim deeds is specifically described."[67] In *Ritz v. Indiana & Ohio R.R.*,[68] the court found the following deed to clearly convey an easement only: "That the said party of the first part in Consideration . . . of the Sum of One Dollar . . . does hereby consent that said party of the Second part (illegible) occupy, and use forever for Railroad purposes so much of the Real and Personal property . . . with its Rights of Way, . . . as lies between the following points. . . ."[69] The courts had no difficulty finding these deeds to convey an easement because the language in the granting clause clearly indicated conveyance of a right only, not the land outright.[70] And where the granting clause did not contradict the limitations of the habendum clause, the interpretation of the deed was fairly straightforward.

Difficulties arise when deeds contain a combination of these elements such that it is unclear exactly what was intended from the language of the deed. This can occur, for example, when the granting clause uses the language of a fee simple but the right is referred to in the habendum clause as an easement. It can also occur when the language is so informal or inaccurate that it is difficult to identify

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63. IND. CODE § 32-1-5-4 (1993). *See also id.* §§ 32-1-5-1 to -10 (1993 & Supp. 1996).

64. 458 N.E.2d 251 (Ind. Ct. App. 1983).

65. *Id.* at 252-53.

66. 478 N.E.2d 684 (Ind. Ct. App. 1985).

67. *Id.* at 685.

68. 632 N.E.2d 769 (Ind. Ct. App. 1994).

69. *Id.* at 773.

70. This is to be contrasted with the deed at issue in *Consolidated Rail Corp. v. Lewellen*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997), where the granting clause referred to land. *See infra* Part IV.

which section is the granting clause and which the habendum clause. In *Brown v. Penn Central Corp.*,[71] the deed specified "[t]hat [the grantors] do give, grant, bargain, sell and convey . . . the right of way for the use of the Railroad."[72] This deed was found by the court of appeals to be ambiguous because it purported to convey both the strip of land and a right-of-way. The Indiana Supreme Court reversed, finding that it conveyed only a right-of-way. The presence of both fee simple and easement language forced the courts to look beyond the terms themselves to resolve the ambiguity.

How the courts decide whether a deed is ambiguous and, if so, whether to construe it as a fee simple, a defeasible fee, or an easement, depends on applying a series of rules of construction and making educated guesses about the application and outcome of those rules. In an attempt to explain some of these rules, I will begin with the most important and offer some examples that Indiana courts have faced in recent years.

The first rule is that we must try to ascertain the intention of the grantor. If that intention is evident from the specific language of the deed, then we need look no further. But if the deed is unclear, there are two generally-accepted rules for where to look next. The first is to look at other sources indicating what the grantor believed he had given away.[73] Thus, a later will, in which the grantor devised his remaining property, which he described as a fee simple with no mention of the railroad's land would indicate that he believed he had given the railroad the strip of land in fee. Because he did not include any mention of the railroad's strip in a later conveyance of his remaining land, he presumably did not believe he retained any rights in that strip. Similarly, if the grantor later executed a warranty deed for his remaining land and did not include a description of the railroad's strip, he presumably did not believe he had retained any rights in that strip. On the other hand, if the grantor later executed a quitclaim deed in which he conveyed all of his rights and interests in his remaining land and in the railroad's strip, it would be reasonable to assume that he believed he had retained either a reversionary interest in that strip or had granted only an easement. Thus, the next place to look is at subsequent conveyances of the grantor's remaining land.[74]

The second rule for ascertaining the grantor's intent is the presumption against forfeitures. This presumption, which has been codified in some states, holds that every conveyance of real estate shall pass all the estate of the grantor unless the

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71. 510 N.E.2d 641 (Ind. 1987).

72. *Id.* at 643.

73. *See, e.g.*, City of Manhattan Beach v. Los Angeles Superior Court, 914 P.2d 160 (Cal.), *cert. denied*, 117 S. Ct. 511 (1996) (in which court looks to several subsequent documents executed by the grantor as evidence that the grantor conveyed fee simple absolute to the railroad).

74. This may not be conclusive, however, for she might choose to convey all of her land except her rights in the railroad's strip, in which case she could retain a reversionary interest that might devolve on her heirs rather than on the adjoining landowner in case the railroad's interests are extinguished. *See* C.J.S. *Deeds* § 93 (1956 & Supp. 1996); King County v. Squire Inv. Co., 801 P.2d 1022 (Wash. Ct. App. 1991) (grantor's successor retained reversionary interest, not abutting landowner).

intent to pass a lesser estate appears clearly, or is necessarily implied, from the terms of the conveyance.[75] The policy reason behind this presumption is to promote the marketability of estates of land as fully and completely as possible and to prevent the disruptions that occur from changes in ownership due to the termination of lesser interests. Hence, where the goal is to protect the reasonable expectations of the parties and their settled interests, courts will look long and hard before they work a forfeiture or termination that results in a change in ownership. At this first stage, therefore, we can see a presumption in favor of fee simple unless limitations are expressly and clearly evident on the face of the deed.

If the grantor's intent is still not evident from the above-described tests, courts also look to such extrinsic evidence as the amount of money paid by the railroad[76] or statutes restricting the kinds of interests the railroads may acquire under eminent domain. These statutes provide a backdrop for understanding the kinds of property interests that the parties reasonably believed were up for negotiation. Although the 1905 Condemnation Act prohibited the railroads from acquiring fee simple title by condemnation, it did not prevent them from purchasing fee simple title directly from the landowners.[77] Other documents or circumstances surrounding the original grant, may also clarify the grantor's intent.

Also, under section 32-1-2-12 of the Indiana Code, deed language that uses terms customarily associated with fee simples, will pass a fee simple regardless of conflicting language in the habendum clause. The statute reads: "any conveyance of lands worded in substance as . . .'A.B. conveys and warrants to C.D.' . . . shall be deemed and held to be a conveyance in fee simple."[78] As is consistent with general rules of construction, only if the granting clause is indefinite will courts look to the habendum clause for help in defining the interest being conveyed.[79] Thus, if the granting clause is clear and specific, it controls without reference to any confusing or conflicting limitations in the habendum clause.

The Indiana Supreme Court has addressed a number of these rules of construction in relation to railroad deeds in its influential opinion in *Ross, Inc. v. Legler.*[80] First, the parties must prevail only on the strength of their own title, not on weaknesses of their opponents' title.[81] Second, construction of the deeds must

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75. *See, e.g.*, WYO. STAT. ANN. § 34-2-101 (Supp. 1996).

76. *See* Tazian v. Cline, 673 N.E.2d 485 (Ind. Ct. App. 1996). *See also supra* note 11. It is also important to remember that the consideration recited in the deed may not reflect what was actually paid.

77. *Cf.* McKinley v. Waterloo R.R., 368 N.W.2d 131, 135 (Iowa 1985) (distinguishing conveyances governed by statute and those governed by private agreement as expressed in a deed); Brown v. Washington, 924 P.2d 908 (Wash. 1996) (giving thorough analysis of deed construction in light of eminent domain statute).

78. IND. CODE § 32-1-2-12 (1993).

79. *See* 4 HERBERT THORNDIKE TIFFANY, TIFFANY ON REAL PROPERTY § 980 (3d ed. (1939)). "The habendum and subsequent covenants may modify, limit and explain the grant, but they cannot defeat it when it is expressed in clear, unambiguous language." *Id.*

80. 199 N.E.2d 346 (Ind. 1964).

81. This has long been the law in Indiana. *See* Grigsby v. Akin, 28 N.E. 180, 181 (Ind.

encompass every part of the deed, not just a part. Third, deeds should be construed so that no part will be rejected. Fourth, public policy does not favor the conveyance of strips of land by fee simple titles because alienation from the parent bodies of land would create otherwise unusable strips of land. However, this fourth rule should be read in light of the court's footnote that "a possible and reasonable exception within the public policy might exist where such easement and right-of-way is conveyed to and dedicated by a governmental body for a public right-of-way."[82]

Unfortunately, the *Ross* court held that a railroad deed, "when the interest conveyed is *defined or described* as a 'right of way,' conveys only an easement in which title reverts to the grantor . . . upon the abandonment of such right-of-way."[83] The court held that the deeds at issue in that case transferred only an easement because each deed expressly described the conveyance as a right-of-way. This holding, which has been denominated the "*Ross* rule," was too broadly stated and has therefore been misapplied in some later cases. The issue, as cogently argued by the dissent in *Ross*, is that the rule the majority expressed is too general, that merely describing the land as a right-of-way does not necessarily convert it into one.[84] In *Ross,* the deeds used the term "conveyed" a parcel of land (with a description) in the granting clause, which was then followed by the sentence: "Said strip of right of way being located in the . . . [description]."[85]

The problem with *Ross* is that a description of a right-of-way in the habendum clause should not, under standard rules of deed construction, override a clear, unambiguous grant of a fee simple in the granting clause. This does not mean that use of the term right-of-way is irrelevant. The logical rule, and the rule that was most likely intended by the majority, is that where the deed is ambiguous *and* the granting clause is not specific, references to the interest being conveyed as a right-of-way gives rise to a presumption that an easement was intended. However, later

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1891). Amazingly, this cardinal rule of property law appears to have been neglected by the courts to date in resolving title disputes between the railroads and adjacent landowners. Without presenting evidence of a deed containing a description of the disputed corridor land, the adjacent landowners have no standing to challenge the railroads' title. *Id.* at 347 and cases cited therein.

82. *Id.* at 348 n.2.

83. *Id.* (emphasis added). However, the *Ross* court noted that the deed "expressly defined and described" the right as a right-of-way, which is more than a mere mention of the term.

84. *Ross*, 199 N.E.2d at 350-51. The *Ross* majority decision was questioned in *Phar-Crest Land Corp. v. Therber*, 242 N.E.2d 641, 642 (Ind. App. 1968) in which the court of appeals made the following comment: "It is the considered opinion of more than two members of this Court that the majority opinion of the Ross case, . . . is erroneous and that the dissenting opinion of the Ross case correctly states the law applicable to the factual situation now before us. Therefore, this cause is now transferred to the Supreme Court." Unfortunately, the supreme court declined to address the value of the *Ross* precedent and instead dispensed with the case on laches. Phar-Crest Land Corp. v. Therber, 244 N.E.2d 644 (Ind. 1969). The question remains, therefore, as to whether or not the *Ross* rule, that describing land as a right-of-way implies that only an easement was conveyed, will survive for long.

85. *Ross*, 199 N.E.2d at 351.

cases have misapplied the *Ross* language, even when the right-of-way language was the only term that was inconsistent with a clear grant of a fee simple.[86]

Apparently, the *Ross* majority believed that arguments about granting clauses and habendum clauses were an "overrefinement of the rules of construction."[87] This is particularly troubling, not just to property professors, but in light of the well-recognized dual meaning of the term "right-of-way." Where a legal term has two meanings, its use should not magically create an ambiguity.[88] The U.S. Supreme Court has noted that the term, "right-of-way," has two distinct meanings, thus presenting a possible ambiguity that precludes the creation of a strict rule: "the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed."[89] In addition, the Indiana Supreme Court has recognized this distinction, a distinction between a legal right and the physical corridor of land, by citing nearly the same language the U. S. Supreme Court used in *Joy*.[90] Nonetheless, some attorneys have argued for a blind application of the *Ross* rule in which any mention of the term "right-of-way" in a deed converts the property right into an easement.[91] Such an interpretation is of questionable merit and

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86. *See* Consolidated Rail Corp. v. Lewellen, 666 N.E.2d 958 (Ind. Ct. App. 1996), *aff'd*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997).

87. *Ross*, 199 N.E.2d at 351.

88. The court's reasoning violates the basic rule of construction that the granting clause defines the property right being conveyed and takes precedence over ambiguous or non-explicit limitations in the habendum clause. As Cunningham, Stoebuck & Whitman explain in their influential property treatise: "For some reason, easements seem to evoke careless drafting. The instrument should say that the grantor or testator 'grants' 'an easement [or profit] for the purpose of' such and such to the grantee. One should avoid words of grant like 'convey and warrant' or 'quitclaim and convey,' which suggest estates in land. The thing conveyed should be described as an 'easement' or 'profit' or, if in doubt, a 'right to use' but never as a 'strip of land,' 'right of way,' or the like. These latter phrases are very suggestive of an estate and have caused terrible problems, especially in any number of railroad cases." CUNNINGHAM ET AL., *supra* note 43, § 8.3, at 442. In general, terms like "convey" and "warrant" that show up in the granting clause should be interpreted to convey a fee simple, regardless if the property is later "described" as a right-of-way.

89. Joy v. City of St. Louis, 138 U.S. 1, 44 (1890).

90. *See* Marion, B.&E. Traction Co. v. Simmons, 102 N.E. 132, 133 (Ind. 1913). Other courts have recognized the two meanings of right of way. *See* Brown v. State, 924 P.2d 908, 914 (Wash. 1996). Also, Black's Law Dictionary distinguishes between the two meanings of right-of-way as "a right belonging to a party to pass over land of another, but it is also used to describe that strip of land upon which railroad companies construct their road bed, and, when so used, the term refers to the land itself, not the right of passage over it." BLACK'S LAW DICTIONARY 1326 (6th ed. 1990).

91. In *Ross*, the granting clause appeared to convey a fee, but the habendum clause described the interest as "[a]ll of that right of way." The court used the public policy of limiting railroad rights to easements to support its interpretation that the habendum clause limitation should determine the nature of the interest. On the other hand, in *Pumpkinvine*, the Elkhart Superior Court

should be avoided whenever possible.[92]

In early June 1997, the Indiana Supreme Court decided a related case that touched on some of these issues. *Hefty v. All Other Members of the Certified Settlement Class*[93] concerned two similar classes that were certified at different times by different courts. A settlement between U.S. Railroad Vest and all persons owning property adjacent to an abandoned Penn Central right-of-way in Indiana was challenged by a second identical class that sought to intervene in the first class negotiations and promulgation of settlement notices. The trial court held a hearing on the fairness of the settlement and issued an order and final judgment accepting the settlement proposal of the first class.[94] The second class appealed, but the court of appeals affirmed the trial court.[95] The supreme court reversed and clarified the standard of review to be applied by a trial court when reviewing a class action settlement, and to that extent the case is not relevant to the issues discussed here.

However, because the case concerned railroad title issues, and because likelihood of success on the merits is one factor to be considered in reviewing a class action settlement, the court briefly reiterated three principles that, it felt, had not been adequately attended to in the settlement hearing and the findings of the trial court. The court reiterated the general principle that ambiguous deeds should be construed against the drafters, which in most instances were the railroads.[96] The court also restated its position in *Brown v. Penn Central Corp.*,[97] that deeds purporting to convey rights are generally construed to pass only an easement and deeds conveying a "a strip, piece, or parcel of land," without limitation, are generally construed to pass an estate in fee.[98] The court then restated the confusing *Ross* rule that "reference to a right-of-way in such a conveyance

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ruled that a similar ambiguous deed conveyed a fee simple. That deed stated, "[A and B] Convey and Warrant to [C], in consideration of the sum of sixteen Hundred dollars, the following real estate . . .: A strip of land eighty (80) feet in width, ... This deed is made subject to . . . the right which the grantors hereby reserve of constructing and maintaining at their own expense two farm crossings, connecting the parts of their farm divided by said right of way, at such points as said grantors shall deem most convenient." *See* Friends of the Pumpkinvine Nature Trail, Inc. v. Eldridge, No. 20D03-9401-CP-009 (Ind., Elkhart Super. Ct. No. 3) (Sept. 2, 1994) (order granting partial summary judgment). The *Pumpkinvine* court refused to interpret *Ross* to mean that any mention in a deed describing the land as a right-of-way suddenly converted the interest into an easement only. The court explicitly held that where the term right-of-way clearly means the strip of land and not the property right to use, the *Ross* rule does not apply.

92. *See id.*

93. Hefty v. All Other Members of the Certified Settlement Class, Nos. 61A05-9308-CV-290, 61S05-9507-CV-799, 1997 WL 287653 (Ind. June 2, 1997).

94. *Id.* at *2.

95. Hefty v. All Other Members of the Certified Settlement Class, 638 N.E.2d 1284, 1292 (Ind. Ct. App. 1994), *vacated*, 1997 WL 287653 (Ind. June 2, 1997).

96. *Hefty*, 1997 WL 287653 at *7.

97. 510 N.E.2d 641 (Ind. 1987).

98. *Hefty*, 1997 WL 287653 at *7.

generally leads to its construction as conveying only an easement."[99] Unfortunately, the age of the cases cited and the general assertion that the term, right-of-way, magically converts the right into an easement do not help clarify the problem that is facing the lower courts in these title cases. The term, right-of-way, clearly carries two meanings, which makes the *Ross* rule difficult to apply and open to misapplication. This is ironically illustrated by the title of this very case. The defendants are "All Other Members of the Certified Settlement Class, Namely, All Initially Noticed Persons Owning Real Property Adjacent to Railroad *Rights-of-Way* in the State of Indiana . . . ." If the definition of right-of-way as an easement was intended, then the class does not include any property owner adjacent to railroad parcels owned in fee simple. If the definition of right-of-way as the strip of land along which a railroad constructs its tracks was intended, the class might be all-inclusive (which was clearly the intention of the lawyers for the class) but it would subvert the principle articulated in the case that mention of the term leads to its construction as meaning only an easement.

Because the court did not have any specific deeds before it, and because the issue of this case was the standard of review in class actions and not railroad deed construction, the case does little more than perpetuate the confusion already created by these thirty-year-old cases. It is hoped, therefore, that the court will take the opportunity to address this issue explicitly in a case specifically on deed construction.

A final issue to be considered in interpreting ambiguous deeds is what, if any, public policy supports a presumption in favor of one construction over another? As we saw with the presumption against forfeitures, public policy supports grants in fee simple because they are more marketable. The *Ross* court, however, explained that public policy, as expressed in the 1905 Condemnation Act, supports a finding that the railroad took only an easement, not fee simple title. Thus, if we have gone through all of the above tests and have still been unable to ascertain whether a deed conveys a fee simple or an easement, we may need to consider the policy expressed in *Ross*. But there are two reasons why the *Ross* language should not be accepted blindly. The first is the footnote creating an exception for public uses. Clearly, all other things being equal, a deed construction that frustrates the *public* use exception must be contrary to *public* policy. And second, the reasons behind the easement presumption do not always support such a finding.

As the court explained:

> Public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such

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99. *Id.* (citing L&G Realty & Constr. Co. v. City of Indianapolis, 139 N.E.2d 580 (Ind. App. 1957)).

> severance generally operates adversely to the normal and best use of all the property involved.[100]

But in the case of railbanking and trail conversions, the alienation of these strips of land is precisely necessary to the purpose for which the conveyances are made after abandonment of rail use. Remember, *Ross* was decided in 1964 when neither railbanking nor trail use was seen as a valuable use of these strips of land. The issue in *Ross* was whether it was better to find the railroad had fee simple so that the railroad's grantees would acquire the strip or to find the railroad had only an easement, in which case abandonment would allow the servient estate owner to reclaim use of the land. The situation envisioned in *Ross* is that a finding of fee simple for the railroads would lead to sales or reversions of small sections of the corridors to outside, disinterested parties. But that is not to be feared in the case of railbanking and trail conversions because the value of the property exists specifically in its being a long, narrow strip of land severed from its adjoining neighbors. Thus, even the public policy reasons behind the *Ross* easement presumption do not pertain thirty-three years later in light of modern railbanking and public trail needs.

Clearly, the *Ross* court did not imagine that it was creating a rule whereby any mention in a deed of a right-of-way proved per se that the parties only intended an easement, especially because the term right-of-way has two meanings, only one of which would act as a limitation. The *Ross* rule instead should be interpreted to mean that "express descriptions" of the *interest* (not the land) should be interpreted to convey an easement. But most importantly, the term right-of-way is not a synonym for the term easement. Where there exist two recognized and well-defined meanings of the term right-of-way, there is no reason to assume that use of the term in a deed automatically creates an ambiguity to which public policy and rules of construction should then be applied. Courts should first substitute each meaning into the deed language and adopt whichever meaning is most consistent with the language of the deed as a whole.

As should be apparent by now, interpreting ambiguous deeds is not a simple process. However, the common law has developed a number of interpretive aids which should allow the courts to reach the best decisions in most cases. And even when the deeds are still unclear, the presumption is clearly in favor of finding fee simple title in the railroads. This is because a finding of fee simple or a defeasible fee both support the presumption against forfeiture and the rule of the superiority of the granting clause. Additionally, the public policy reasons behind the *Ross* easement presumption are questionable and the *Ross* rule of construction is overbroad and has been called into question by the lower courts.

This does not mean, however, that all railroad deeds should be construed as fee simple absolutes. On the contrary, clear grants of easements and ambiguous grants that, in light of the foregoing rules of construction, are deemed to be easements must be subjected to the laws regarding extinguishment of easements. Nonetheless, once we have ascertained the railroad's interest in the corridor land,

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100. Ross, Inc. v. Legler, 199 N.E.2d 346, 348 (Ind. 1964).

we can proceed to the second stage, identifying the current interests of the different parties.

2. Step Two: Who Now Holds the Original Grantor's and Grantee's Interests?—Once we know what interests in the corridor land the grantor conveyed to the railroad, we also know what rights, if any, the grantor retained in that land. The railroads appear to have kept good records of their conveyances to successive railroads so that any deviation between the interest the original railroad acquired and the interests now owned by a current railroad or its successor should be traceable. If the railroad received either a fee simple or a defeasible fee its successors now have good title to the corridor land. If the railroad acquired only an easement, however, we must determine who now holds the title to the easement and who holds title to the burdened land. For simplicity's sake, I will assume that the railroad has quitclaimed its easement rights to either a successor railroad or those rights have already been sold to a trail group or a governmental entity. In that case, we know who holds the easement right and who will lose that right if, at stage three, the easement is found to have been extinguished.

The original grantor of the corridor land retains no interest in the land if he conveyed a fee simple. If he conveyed a defeasible fee[101] *and* kept his reversionary interest alive through periodic recording, his successors in interest have a true reversionary right. This right may or may not be included in later conveyances of the adjoining land. If it was, the reversion is held by the adjoining landowner. But if it was severed, which would occur at any time the adjoining land was conveyed without a description of the corridor land or mention of the reversionary right, the adjoining landowners would have no interest in or title to the corridor land, even if the reversion is triggered.[102]

If the railroad held only an easement, the original grantor retained title to the corridor land and could convey that title to others. If, as would most likely be the case, he conveyed it along with his interest in the adjoining land, the current landowners must present a valid deed that includes a description of the corridor land in their chain of title. If they cannot prove title to the corridor land, it will be deemed to have been severed and retained by the grantor and his heirs.[103] Thus,

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101. The defeasible fee could either be a fee simple determinable or a fee simple subject to a condition subsequent.

102. It may very well be the case that the original grantor, in a subsequent conveyance of his remaining land, purposefully omitted a description of the corridor because he could not warrant that the railroad's strip was free of encumbrances. It is vital, therefore, that a close examination be made of the successive conveyances of the adjoining land. For unless the adjoining landowner can prove his or her right to the land, on the strength of his or her own title, the weaknesses in the railroad's interest are irrelevant.

103. *See* King County v. Squire Inv. Co., 801 P.2d 1022 (Wash. Ct. App. 1991) (holding that the railroad acquired an easement and that it had been extinguished, the court found title in the grantor's heirs, not the adjacent landowner). As the court noted:

> [Adjacent landowner's] ownership should be determined according to the title he holds. . . . Why should the successors to the grantor of a right-of-way be deprived of their title without notice? The fact that the property may have greater value to the abutting owner

if the easement is extinguished, either the adjoining landowner's fee will be disencumbered or the grantor's heirs will be able to take their possessory rights free of the railroad's easement. Whoever is deemed to have retained the underlying fee may convey it to a trail group if he or she desires.

It is important that any claimant must present clear title to the underlying fee of any railroad easement. If the adjoining landowner cannot show clear title, he or she may acquire it through the operation of state law. Section 32-5-12-10 of the Indiana Code provides that the owner of the underlying fee (the "right-of-way fee") will acquire the railroad's interests upon the railroad's abandonment of its rights. The fee owner must provide a deed that contains a description of the real property that includes the easement or right-of-way. Only if there is no deed will the railroad's interests vest in the owner of the adjoining fee under section 32-5-12-10(c) of the Indiana Code. This section applies only if the railroad does not own the underlying fee.

In sum, if the railroad owned only an easement, and we can ascertain who owns the underlying fee, we must proceed to step three to determine what must occur for the railroad's interests to be extinguished and vest in the fee owner.

3. Step Three: Has the Railroad's Easement Been Extinguished?— Termination of an easement, under Indiana law, can occur upon any number of events. The railroad could release the right to the owner of the underlying fee so long as it is accepted by the fee owner. The right to an easement may be lost by an adverse occupation by the servient estate owner through the usual acts of hostile, notorious, exclusive, open, and continuous use for the statutory period. Or, an easement can be abandoned. However, nonuse, by itself, does not constitute abandonment.[104]

Termination of a railroad easement, under a theory of abandonment, must depend on an "intent to release the property right" and not just an intent to discontinue use. Even if an abandonment certificate has been issued by the ICC, the railroad's easement should not be terminated unless there is an independent showing of intent to abandon the easement. Additionally, a limitation on an easement that would terminate the right must be clearly established.[105] As I discussed more fully in Part II, claimants must show "consummation of abandonment" before the railroad's state property interest will be extinguished.

IV. THE *LEWELLEN* CASE

All of these issues of abandonment and deed construction are implicated in the court of appeals decision in *Conrail v. Lewellen* and its affirmance by the supreme

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than to the successor of the grantor was not found persuasive . . ."

Id. at 1027-28.

104. "An easement created by grant is generally not lost through mere non-use." Brock v. B&M Moster Farms, Inc., 481 N.E.2d 1106, 1108 (Ind. Ct. App. 1985).

105. *See* Indiana Broad. Co. v. Star Stations, 388 N.E.2d 568 (Ind. Ct. App. 1979); GTA v. Shell Oil Co., 358 N.E.2d 750, 753 (Ind. App. 1977).

court on June 19, 1997.[106] And unfortunately, neither court interpreted the deeds in compliance with the well-established rules of construction elaborated here. Because the supreme court primarily affirmed the court of appeals decision without much discussion, I will explain and critique the reasoning of both opinions in order. In the case, the court of appeals found the following deeds conveyed easements only:

> [Grantor], for consideration, " . . . hereby Conveys and Warrants to the [Railroad] the Land, Right of way and Right of drainage for its Railway . . ." One of the deeds also contains the following language: "(if the Road is abandoned this Land Returns to me)." One of the deeds conveyed "a strip of land through a part of a lot of land of twenty acres . . . for the Right of Way of [Railroad]." Another conveyed "the Right of Way for so much of said Rail Road as may pass through the following described piece, parcel or body of land. . . ."[107]

A quick look at the 1852 statute shows that railroads had the power to condemn whatever land was necessary for its railroad, including "a right of way over adjacent lands sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts and the right of making proper drains."[108] Nonetheless, the court held:

> that use of the term 'right of way' causes the deeds in question to convey easements only. To hold, as Conrail urges, that the 'right of way' interest is merely subsumed in the conveyance of the 'land' in fee simple, would render use of this key term superfluous or meaningless in the interpretation of the deed. We hold that 'right-of-way' means easement regardless of whether the deed may be considered ambiguous because the term 'right-of-way' can have two meanings, as discussed above.[109]

The court of appeals' decision is incomprehensible on a number of grounds. First, the court appears not to have looked at the statute in force governing railroad deeds at the time. The statute clearly envisions appropriation of fee simple title to the corridor land, as well as title to land for side-tracks and water stations, and for rights to construction materials (generally gravel), access easements for construction and maintenance, and drainage. The statute explicitly provides that the railroads may acquire multiple estates, including fee simple title to the corridor

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106. 666 N.E.2d 958 (Ind. Ct. App. 1996), *aff'd*, No. 54S01-9706-CV368, 1997 WL 335018 (Ind. June 19, 1997).

107. *Id.* at 960.

108. IND. CODE § 8-4-1-16 (1993).

109. *Lewellen*, 666 N.E.2d at 963. Reference to standard railroad operating procedures manuals and books on the railroads shows that after acquiring the actual corridor and depot lands, the railroads also made provisions for access to the tracks for maintenance purposes and rights to drain the corridor land of surface water. *See, e.g.*, Orwig, *The Real Estate Records of a Great Railway System*, 49 ENGINEER NEWS: A JOURNAL OF CIVIL, MECHANICAL, MINING, & ELECTRICAL ENGINEERING 108 (1903).

land plus easement rights over the adjacent land for access and drainage. It is not a matter, therefore, of the deed granting either fee simple *or* an easement; it clearly granted both. In fact, this specific deed appears to have granted three interests: fee simple in the land, an easement for access, and drainage rights. It is important to realize that the rights-of-way listed in the deed do not pertain to corridor land, because clearly the corridor land is the dominant estate, not the servient one. It cannot be an easement and also hold an easement. Hence, the grantor conveyed fee title to the corridor land and granted two appurtenant easements over his remaining land for access to and drainage from the granted fee corridor. This represents the standard diversity of potential interests envisioned by the statute and makes sense of all three elements of the granting clause.[110] Moreover, it avoids the finding of a forfeiture.

Second, the court suggests that the grant of land somehow included within it the lesser rights of access and drainage. But this is clearly illogical. Although it is true that a grant of fee simple, because it is the most comprehensive bundle of sticks, must contain lesser rights, the rights of access and drainage in this case pertain to the adjacent, servient land, not the corridor land itself. To say that one owns a right-of-way over land one owns in fee simple is certainly true, but nonsensical. But if one grants a fee and a right-of-way, the obvious interpretation is that the right-of-way is over the *neighboring* fee for access to the *granted* fee. Similarly, it would be absurd to interpret the deed as granting a right of drainage within or onto the corridor land, which is implied by the argument that the fee includes the right of drainage. Instead, the right of drainage is clearly the right to expel surface water from the corridor onto the adjacent land, and thus implies a servitude on the *neighboring* fee, i.e. the fee retained by the landowner. Because many railroad beds are elevated, drainage, and the right to be free of liability for damage caused by run-off, is an important right that the railroads would explicitly seek and purchase.[111] Thus, not only is this deed unambiguous, it so closely tracks the language of the 1852 statute and the physical requirements of the railroads that any other construction is illogical and inconsistent.

Third, the deed also uses clear, explicit fee simple language of convey and warrant in the granting clause.[112] The court erroneously cites the *Ross* rule to be

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110. For deeds that convey multiple interests, including fee simple absolute and an easement, in the granting clause, see Annotation, *Conveyance of 'Right of Way,' in Connection with Conveyance of Another Tract, as Passing Fee or Easement*, 89 A.L.R.3D 767 (1984 & Supp. 1996).

111. *See* Martin J. McMahon, Annotation, *Liability for Diversion of Surface Water by Raising Surface Level of Land*, 88 A.L.R.4TH 891 (1991 & Supp. 1996) (discussing liability of railroads for diversion of surface water); City of Manhattan Beach v. Los Angeles Superior Court, 914 P.2d 160, 163 (Cal.), *cert. denied*, 117 S. Ct. 511 (1996) (deed stating, "culverts shall be constructed and maintained as may be necessary for the free passage of water across the same, and so located that the lands adjacent to said right of way will not be flooded on account of the roadbed of said railroad forming an embankment." The right of drainage did not defeat the conveyance as a fee simple, nor did the term right of way in the drainage clause.).

112. This holding cannot be reconciled with the statute. "Any conveyance of lands worded in substance as follows: 'A.B. conveys and warrants to C.D.' . . . 'for the sum of' . . . *shall* be

that "any reference to a right-of-way in a deed . . . [conveys] only an easement."[113] But *Ross* did not say "any reference;" it said where the *interest* is "defined or described as." This is exactly the kind of misapplication the dissent in *Ross* feared. This deed does convey an easement. But it also conveys fee simple title.

Fourth, the court erroneously relies on the fact that there are two different meanings to the term, right-of-way, as somehow creating a per se ambiguity in the conveyance. The ambiguity, it asserted, therefore justifies application of the *Ross* rule so that mere mention of the right-of-way causes the deed to be interpreted as an easement. But where either meaning of right-of-way leads to the same result, the "ambiguity" is the result of a judicial sleight of hand. One interpretation (that the term refers to the strip of land itself) is in accord with the granting clause conveying a fee simple, and the other interpretation (that the term refers only to a right which is subsumed in the greater interest to the land and is attached to the land) is also in accord with the grant of a fee simple. The court thus creates confusion where it does not exist. By calling the deed ambiguous when it contains one term with two alternative meanings, each of which leads to the interpretation of a fee simple, the court seems to think ambiguity allows it to apply the public policy rule of *Ross* to override the clear language of the conveyance and the clear statutory command.

Fifth, the court also cites to the language in *Ross* that "[p]ublic policy does not favor the conveyance of strips of land by fee simple titles to railroad companies for right-of-way purposes. . . ."[114] The court, however, neglects to mention the footnote in *Ross* that "a possible and reasonable exception within the public policy might exist where such easement and right-of-way is conveyed to and dedicated by a governmental body for a public right-of-way."[115] Hence, even if the conveyance was ambiguous, it is not at all clear that public policy reasons demand interpreting the deed as an easement.[116] In this case, the land was not isolated, but was accessible from a public thoroughfare.

Sixth, even if the court finds these deeds convey easements only, it is not at all evident that Conrail has abandoned its property interests in the corridor so as to extinguish the easements. Although Conrail received a certificate of abandonment from the ICC in 1982 and removed the tracks, Conrail left other

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deemed and held to be a conveyance in fee simple . . . ." IND. CODE § 32-1-2-11 (1993) (emphasis added). Where the legislature has mandated that certain language "shall be deemed" a conveyance in fee, the courts usurp the legislative prerogative to determine how property rights will be conveyed when they decline to follow the express terms of the statute. *Compare City of Manhattan Beach*, 914 P.2d at 167 (applying numerous statutes on deed language and deed construction to find a quitclaim deed conveying a "right-of-way" conveyed fee simple title).

113. *Lewellen*, 666 N.E.2d at 962.

114. *Id.*

115. Ross, Inc. v. Legler, 199 N.E.2d 346, 348 (Ind. 1964).

116. The court's statement that "this public policy argument raises serious questions regarding the taking of private property rights . . ." puts the cart before the horse. If the deeds convey fee simple, there will be no taking. Moreover, the court, it seems, gave little or no thought to upsetting the private property rights of the railroad.

structures, like bridges, culverts, and drainage tiles in place. Conrail also continued to pay real estate taxes on the land. In 1992 Conrail entered into negotiations to sell its property rights for a trail conversion and executed a quitclaim deed in July 1994. All of these activities evince a belief on the part of Conrail that it had not abandoned its rights to the disputed property. And just as we construe the grantor's intent liberally in interpreting deeds, so too must we do in construing the intent of Conrail to give up a valuable property right. It might be most helpful if the court would consider what, if any, activities Conrail must do, short of operating railroad services at a loss, to preserve its property interests in the corridor land. It must be pointed out that terminating Conrail's legitimate property rights without a judicial determination of abandonment is unconstitutional.[117]

The Indiana Supreme Court recently affirmed this decision. In doing so, the court spent a mere four paragraphs on the issue of deed construction, blindly adopting the lower court's rationale, and it did so without the benefit of oral arguments or substantive briefs on the merits. This is particularly disturbing because the issue is of extreme public importance and, by not addressing the legal claims directly, the court is losing the chance to clarify the precedents, overrule the dangerous *Ross* rule, and bring Indiana into harmony with the other states that have actually faced these cases head-on. Not only is Indiana a black hole in the middle of a nationwide system of trails, but its law continues to reflect nineteenth-century frontier attitudes in which uniformity among one's neighbors and conformity with well-established principles of property laws were not values to emulate.

Justice Sullivan's opinion is open to less criticism than Judge Robertson's of the court of appeals only because it is less substantive. Sullivan notes that the Indiana statute in place at the time of the grant, and still in place, requires that deeds using the terms "convey and warrant" the land shall be deemed to convey the property in fee simple. But his application of the law to the deeds in the case is frankly incomprehensible.

> With regard to this argument, we adopt the Court of Appeals' reasoning that the use of the term "right of way" in the deeds in issue in this case conveyed to the railroad only an easement. We emphasize that the language of the deeds in question in this case does not trace the cited property statutes. Rather, the majority of the deeds states that the grantor "conveys and warrants" to the railroad "Land, Right of way, and Right of drainage for its Railway."[118]

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117. *See* Penn Cent. Corp. v. U.S. R.R. Vest Corp., 955 F.2d 1158 (7th Cir. 1992) (holding Indiana statute unconstitutional).

118. Consolidated Rail Corp. v. Lewellen, No. 54S01-9706-CV368, 1997 WL 335018, at *2 (Ind. June 19, 1997). Should it be necessary to prepare three separate deeds in order to prevent the complete annihilation of two of the interests which the court effected in its current interpretation?

The only way in which the deed deviates[119] from the language of the statute is that it purports to convey two additional property interests besides the land: an easement to access the land over the neighboring fee and a right to expel surface water. The fact that three interests are being conveyed instead of one does not undermine the obvious application of the statute to the first interest, the conveyance of the land.

Sullivan also notes, after having already decided that the deed conveys a mere easement only, that the principle object of deed construction is to ascertain the intent of the grantors. But without further mention of what the grantors might have intended, Sullivan cites the 1957 *L&G Realty* case that "reference to a right-of-way in such conveyance generally leads to its construction as conveying only an easement."[120] This rule's application in this case is preempted by the statute mandating that deeds using the relevant convey-and-warrant-the-land terms "shall be deemed" fee simple conveyances. Thus, for the first property interest, the land, the statute should apply to determine that the interest conveyed was fee simple title. For the second property interest, the right of way for access to the land, the common-law rule about conveyances of rights of way would apply to find that the railroad acquired an easement to build and maintain their railbed. And for the third property interest, the servitude allowing the railroad to drain its corridor of surface water, the common-law rules of servitudes should apply. Any other interpretation is inconsistent with the conveyancing statute, the eminent domain statute, the common-law rules on deed construction and servitudes, and the real-life practices and needs of the railroads.[121]

Furthermore, the court rejected the argument that even if the interest conveyed was an easement, it had not been abandoned by finding that the 1987 statute preempted state common-law rules requiring intent and consummation of abandonment. Under the statute, a railroad was deemed to have abandoned its easement rights when the ICC issues a certificate of abandonment and the "rails, switches, ties, and other facilities" have been removed from the right of way.[122] In this instance, the railroad had removed its rails and ties, but had not removed such "other facilities" as trestles, bridges, culverts, drainage tiles and subsurface ballast. In applying the principle of ejusdem generis the court held that "other facilities" could only include things of a like kind or class as those designated by the specific words. This is a nice doctrine in theory, but when considering railroad practices, it is difficult to come up with any "other facilities" that are in the same kind or class as ties and rails since there aren't any. The fact is that rails, ties, and

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119. Justice Sullivan's interpretation also reads the conveyance of land right out of the deed. Moreover, Justice Sullivan's emphasis on the fact that "the deeds in question in this case do[] not trace the cited property statutes" is misplaced because the statute only requires that the wording be "in substance." IND. CODE § 32-1-2-12 (1993).

120. *Lewellen*, 1997 WL 335018, at *7.

121. Also troubling about this decision is that the court applies cases conveying a single property interest to the current deeds which clearly conveyed three separate and distinct interests.

122. IND. CODE 8-4-35-4 (1993) (repealed 1995) (current version at IND. CODE § 32-5-12-6(a)(2) (Supp. 1996)).

switches are the only things that lie on gravel beds, bridges, culverts, and drainage tiles which in sum constitute the entire set of facilities that make up a railbed. If the court wishes to restrict the class to things that are like ties and rails and unlike bridges and trestles, the term "other facilities" will be meaningless because it will be an empty category.

And finally, the court rejected the argument that public policy favoring preservation of railroad corridors should count as a factor in interpreting these railroad deeds. The court dispensed with this issue by deciding that the public policy evinced by the National Trails System Act and the Indiana Trails Act would be considerations only in legal disputes involving application of those acts. But that is an absurd limitation. If the case concerned actions taken pursuant to either of these statutes we would not need to consider public policy because the statutes would tell us what to do. But in construing ambiguous deeds, public policy clearly is a relevant factor, and where better to discover public policy but in the public acts of the state and federal legislatures?

This is a disappointing turn of events for many reasons. First, one always hopes that the Indiana Supreme Court, which has the final say regarding Indiana law, will address itself to a serious and comprehensive analysis before handing down a decision. The very brief discussion of deed construction in this case makes it unworthy of the precedent it purports to set. Second, the court failed to address a number of crucial issues presented by the lower court's opinion, like whether the landowners in this case had shown clear title to have standing to challenge the railroad's title in the first place. Third, there was no reference to the 1852 statute in place at the time of the conveyance that would have clarified the types of property interests the railroad was likely to acquire. And fourth, the importance of this issue to the future of Indiana property law and the economic development of the state requires a more thoughtful and careful analysis of the property rights being litigated than what was given.

Although it may be too late for the court to reconsider its hasty ruling in this case, it will have more opportunities to reconsider the *Ross* rule. The precedent it set is unsatisfactory and will continue to generate further litigation in the near future. Hopefully, because *Ross* was decided in 1964, the court may decide the public policy rationale expressed in *Ross* requires modification, especially in light of the national and state policies of promoting railbanking and trail conversions.[123] The rule in *Ross* is also unworkable if it means that any mention anywhere in the body of a deed of the term, right-of-way, magically converts the conveyance into an easement for it continues to lead to absurd results like the *Lewellen* decisions. Such a rule violates rules of construction regarding looking first and foremost to the grantor's intent, rules regarding the character of granting and habendum clauses, and general rules about specificity and public policy. The *Ross* rule also ignores the fact that the term, right-of-way, has two meanings, at least one of which is consistent with a grant in fee simple.

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123. The court would be well-advised to consider the common-law maxim: "*Cessat ratione legis, cessat et ipsa lex.*"

V. POST-ABANDONMENT EASEMENTS AND REVERSIONARY RIGHTS

In many of these railway situations, courts are faced with ambiguous deeds, confusion on the parts of adjoining landowners, ambivalence by the railroads as to whether they have abandoned or not, and a whole array of messy and confusing facts, dates, circumstances, and opinions. In deciding how to reconcile these disputes, the courts must look to overarching laws and policies to aid them in their decision making. I need not remind the reader that courts do more than decide disputes; they make law. In these cases that fall into that ever-expanding gray area, there are many legal and policy considerations for postponing reversionary rights to railroad corridors when the railroad's title is ambiguous or is a mere easement and abandonment is not certain.

One of the most obvious and convincing policy considerations is embedded in the very precedent that has been used to trigger the reversionary rights of adjoining landowners—the public use exception in *Ross*. In 1964, rails-to-trails conversions were unheard of, but the Indiana Supreme Court had the prescience to realize that where public policy considerations actually provide the basis for a rule of construction, that rule must be responsive to changes in social needs and circumstances. Footnote 2 expressly holds out an exception for exactly this kind of situation.[124] With growing demand in urban areas for alternative transportation resources, the public needs of millions of potential users justify a new rule of construction for long-forgotten and unused property claims. Hence, if the postponement of these reversionary rights is not considered a taking, then the public-use exception in *Ross* and the changing definitions of abandonment that postpone these reversionary rights under state law are legally permissible and socially beneficial.

Second, Indiana, along with every other state in the country, has in place a Marketable Title Act[125] designed explicitly to extinguish contingent future interests that are not periodically recorded to give future purchasers notice of pre-existing claims. Indiana's statute requires that "Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the fifty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of said fifty-year period."[126] Thus, if any adjoining landowners do not record their interest within fifty years of abandonment by the railroad, the reversionary interests terminate. Because most of these titles are over 100 years old, the Marketable Title Act should effectively convert all defeasible fees into fee simple title in the railroads because the adjoining landowners' interests have been extinguished.[127]

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124. Ross, Inc. v. Legler, 199 N.E.2d 346, 348 n.2 (Ind. 1964).

125. IND. CODE § 32-1-5-4 (1993).

126. *Id.*

127. Interestingly, the Indiana courts have not interpreted these ambiguous conveyances to be defeasible fees. One reason may be the general dislike of future interests and the possibility of

This Act explicitly provides for deeds that use fee simple language in the granting clause but contain ambiguous limitations. They are, under all rules of construction, defeasible fees which convert to fee simple absolutes upon the passage of time, thus settling property interests that were contingent on possible future events.

And even if the conveyance is ambiguous, the purpose behind these Marketable Title Acts would militate against finding an easement. Property users who occupy, pay taxes, and invest in property are generally deemed to have a stronger interest in the land than those who are dissociated from it.[128] In many cases, the benefit that would accrue to the adjoining landowner from acquiring clear title to these narrow strips may be de minimis. The land is often not productive and, in its current state, can be a nuisance. Cleaning up these corridors, and protecting the property rights of the railroad's successors, furthers the general policy goal of protecting the legitimate property rights of those most interested in the land.

Third, the Indiana statute governing railroad conversions to hiking and biking trails evidences a state-wide public policy promoting railbanking. In 1995, the Indiana Legislature authorized the establishment of a Transportation Corridor Planning Board, a Transportation Corridor Use Master Plan, and resources and mechanisms for acquiring abandoned rights-of-way.[129] The statute provides that "[t]he state may acquire any part of a railroad's interest in a right-of-way under this chapter for any of the following purposes: (1) A present or future rail line. (2) A transportation corridor . . . (4) A recreational trail."[130] The extensive regulations and funding of these conversions not only evince an official statement of the desirability of railbanking and trail conversions, but allow the state to purchase a railroad's "rights-of-way" as well as fee simple interests in corridor land. Use of the term "right-of-way" throughout the Transportation Corridor Act indicates a legislative intent to promote trail conversions of all types of railway corridors, even if the underlying property interests are mere easements.

Fourth, public policy also promotes the establishment of parks, linear trails, and recreational facilities. The City of Indianapolis, after lengthy studies and public meetings, determined that the best use of the Monon corridor was as a recreational trail. Other options, like the operation of a high-speed light-rail

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upsetting settled property interests through forfeitures.

128. In *Lewellen*, Conrail had been paying taxes on the corridor land up to the date of the suit. The court's determination that Conrail held only an easement and that it had been extinguished means that Conrail had been paying taxes on land it did not own for over a decade. The result of this decision may be so far-reaching that county assessors will have to reassess every parcel of land adjacent to an abandoned corridor to insure that the landowner is paying the appropriate property taxes. The burden of doing so is immense and will must likely outweigh the tax revenue to be gained. But this decision so fundamentally undermines settled property rights and interests that a thorough recalculation and investigation will need to be made.

129. IND. CODE §§ 8-4.5-4-1 to -6 (Supp. 1996).

130. *Id.* § 8-4.5-4-2.

system or a bus route were rejected in favor of the needs of recreational users.[131] In Indianapolis, George Kessler, who developed the original Indianapolis parkway system in 1909, envisioned a series of interconnected linear parks to provide needed flood plains and recreational areas.[132] These recreational trails (1) provide economic boosts to local businesses;[133] (2) help clean up what are often unsightly, dangerous and unhealthy corridors; (3) allow bikers and walkers to utilize alternative modes of transportation in ways that reduce environmental impact and pollution and are not a hazard to themselves or motorized traffic; and (4) make for a healthier citizenry. In 1991 Congress initiated a national commitment to recreational trails by explicitly defining biking and walking as forms of transportation (rather than merely recreation), thereby opening up federal transportation funds for development of linear trails.[134]

Fifth, state property laws may extinguish easements when their usage is significantly changed so as to become burdensome to the servient estate. Some landowners have claimed that railroad use is so different from walking and biking that any change from railway use should constitute a termination of the easement. This argument is without merit. Under the doctrine of "shifting public use," a taking does not occur when property is put to a different—but still public—use. The court of claims in *Preseault* cited two noted railroad treatises to explain the doctrine.[135]

> Under the doctrine of shifting public use, when an easement is given for public use, such as a railroad, and then put to another similar use, no abandonment will be held to have occurred. The doctrine has been reviewed by a number of railroad scholars, including Edward L. Pierce, who discussed the shifting public use doctrine in his Treatise on the Law of Railroads:
>
> > Changes of Use, when a new Taking.—The use of property taken by the right of eminent domain is not confined to the precise mode or kind of use which was in view at the time of the taking, but may extend to other modes which were then unpracticed and unknown.

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131. *Saving Strips of Green*, INDIANAPOLIS STAR, June 2, 1994, at A8.

132. Derrick Stokes, *City Plans to Develop 'Linear' Park System*, INDIANAPOLIS NEWS, Oct. 23, 1992, at C3.

133. A Penn State University study estimated $1.25 million in annual direct spending for every 13 miles of trail. Paul Miner, *Hendricks Commissioners Endorse Trail*, INDIANAPOLIS NEWS, Aug. 8, 1995, at C8. A recent study of the Monon Trail by IUPUI showed extensive and varied use of the trail, overall satisfaction by users and adjoining landowners, and significant economic benefits to local businesses along the trail. *See* GRADUATE PLANNING WORKSHOP TEAM, INDIANA UNIV. PURDUE UNIV. INDIANAPOLIS, INDIANAPOLIS GREENWAYS USE AND MANAGEMENT PROJECT, DATA REPORT AND MANAGEMENT REPORT (1996) (on file with author).

134. Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, §§ 1007(c), 1024(a), 105 Stat. 1914, 1931, 1955-62 (codified as amended at 23 U.S.C. §§ 101(a), 134 (1994)).

135. Preseault v. United States, 24 Cl. Ct. 818, 829, 832-33 (1992).

> When property has been taken for a public use, and full compensation made for the fee or a perpetual easement, its subsequent appropriation to another public use—certainly if one of a like kind—does not require further compensation to the owner. Nor is such compensation required when there is a change in the person or body enjoying or controlling the property taken, or in the conditions upon which the public may use it. Accordingly, the adjoining owner is not deprived of any constitutional right when a highway is transferred to a private corporation charged with the duty of maintaining it and invested with the power of taking tolls, nor when a turnpike becomes free to public travel. There is no change of use involving a new taking when, under legislative authority, the location of a plankroad or canal is converted into that of a highway, or of a railroad.
>
> . . . .
>
> A Railroad in a Highway not necessarily a Different Use.—The purpose of opening a highway or street is, to provide the public with a right of passage for persons on foot or riding in carriages or other kinds of vehicles. The use for which this public right is obtained is not confined to the same species of vehicles, drawn by the same kind of power that prevailed at the time of the dedication or appropriation, but admits of the passage and repassage of such other vehicles, operated in such a mode and by such force as an advanced civilization may require. . . .[136]

Chief Justice Redfield also recognized the doctrine of shifting public use in a later 1888 edition of THE LAW OF RAILROADS:

> The mere possibility of reverter to the original owner, or his heirs or grantees, is not regarded . . . as any appreciable interest requiring to be compensated.
>
> . . . The most the owner of the fee could claim in such case is to recover compensation for any additional land taken, and for any additional burden imposed upon the land appropriated . . . [beyond the original use], as well as for any additional damage to the adjoining lands of the same owner.[137]

Most railroad easements may be regarded as "perpetual easements," and subject to the shifting public use doctrine. As one court held: "use of the right-of-way as a recreational trail is consistent with the purpose for which the easement was originally acquired, public travel, and it imposes no additional burden on the servient estates."[138] And if trail conversions are found to be more burdensome

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136. *Id.* at 832-33 (quoting E.L. PIERCE, A TREATISE ON THE LAW OF RAILROADS 233, 234 (1881)) (footnotes omitted).

137. *Id.* at 829 (quoting I.F. REDFIELD, THE LAW OF RAILWAYS 269 (6th ed. 1888)).

138. Washington Wildlife Preservation, Inc. v. Minnesota, 329 N.W.2d 543, 545 (Minn.

than railroad use, the difference could be compensated for by paying the landowners directly for the increased burden.

Indiana courts allow railroads to lease or sell easement rights to public utilities for laying telephone lines, cable, water and sewer lines, and other public services, even when the railroad only held an easement itself.[139] These uses were considered sufficiently in keeping with the original use of the easement so as not to trigger a termination. The Indiana Legislature twice has authorized railroads to grant sub-easements to utility companies for uses that ultimately benefit the public.[140] More importantly, as our cities continue to grow, rail corridors provide ideal locations for utility and public service easements. Even if a railroad abandons its line, it is not unreasonable to argue that trail conversions constitute a continuing use of railroad easements consistent with the public nature of utility and transportation easements.

Sixth, until the Indiana courts have established a clear rule for determining when abandonment of an easement has occurred, courts run the risk of depriving the railroads of their property rights without due process. I have mentioned more than once the confusion that surrounds the issue of abandonment. An ICC certificate of abandonment is not conclusive proof of "intent to abandon" or "consummation of abandonment." Other states have grappled with this issue and determined that a whole series of activities should be considered as factors tending to show abandonment, but no single one should be conclusive. Continued payment of taxes should weigh strongly against a finding of state law abandonment. Although we may disapprove of the way the railroad originally acquired its property rights, no property is safe if we dispense with careful application of well-established property laws and start extinguishing public grants of land when nineteenth-century conditions no longer adhere.

Finally, I must address whether the postponement of these reversionary interests or the continuation of existing easements constitutes a taking without just compensation. As noted above, the U.S. Supreme Court, in *Preseault v. ICC*,[141] found that a landowner's takings claim was premature because a Tucker Act remedy was available in the U.S. Court of Claims. Consequently, the Preseaults brought suit in that court alleging a taking under the NTSA when a railroad easement over their property was converted into an interim trail. The Preseaults argued that their property was taken when the ICC forestalled triggering reversionary rights by ruling that the railroad discontinued rather than abandoned their easement. However, the claims court ruled that a taking only occurs when economic harm results from interference with the reasonable expectations of property owners. Because the Preseaults acquired their property after 1920, they

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1983).

139. *See* Fox v. Ohio Valley Gas Corp., 235 N.E.2d 168 (Ind. 1968); Wendy's of Fort Wayne, Inc. v. Fagan, 644 N.E.2d 159 (Ind. Ct. App. 1994); Deetz v. Northern Ind. Fuel & Light Co., 545 N.E.2d 1103 (Ind. Ct. App. 1989).

140. *See* IND. CODE § 8-1-35-6, -7 (1993) (later held to be unconstitutional for other reasons); *Id.* § 32-5-12-11 (Supp. 1996).

141. 494 U.S. 1 (1990).

did so with notice that their encumbered property rights might be regulated further by the ICC's authority to determine abandonment.[142] The Federal Circuit reversed the claims court in an en banc decision in which there was no majority ruling.[143]

The plurality in *Preseault* ruled that, because the railroad held only an easement and that the easement terminated pursuant to Vermont state law when the railroad removed its tracks in 1975, Vermont could not declare all railroad reversionary interests postponed post hoc in 1982, nor could Vermont convert the rail line to a public trail without offering compensation. The court did not address the fact that the ICC did not authorize abandonment until 1986; instead, they claimed that abandonment occurred pursuant to state law when railroad services were discontinued in 1975.[144] In a strong dissent, three justices argued that the railroad had not abandoned the easements in 1975 because nonuse alone is insufficient for a determination of abandonment and the ICC had not authorized abandonment. Addressing whether track removal should be dispositive of abandonment, the dissent argued that abandonment must contain an element of "intent not to reactivate" in the future. The dissent believed that because Vermont held the easements and continued operating a railroad on tracks just a few hundred yards from the Preseault's property, nonuse did not "provide the conclusive and unequivocal relinquishment signal required by Vermont law."[145]

This is a troubling case for a variety of reasons. It is a striking departure from the then-existing course of judicial proceedings in the Preseaults' controversy.[146] Further, because there was no majority opinion, only the outcome is binding. Additionally, the holding centered on the state-law definition of abandonment which, if occurring prior to the conversion, extinguished the easements. But the ICC had not issued an abandonment certificate at that time. The Court did not address the issue of federal preemptive powers under the NTSA. The Court did not address whether conversion in the case of a continuing easement would constitute a taking. But in the Supreme Court's landmark takings case of *Lucas v. South Carolina Coastal Council*, Justice Scalia noted, in the majority opinion, that: "where 'permanent physical occupation' of land is concerned, we have

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142. *See* Preseault v. United States, 27 Fed. Cl. 69 (1992), *rev'd en banc*, 100 F.3d 1525 (Fed. Cir. 1996).

143. Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996). *See also* Dennis Long, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 IND. L.J. 1185 (1997).

144. This fact alone should warrant reversal by the Supreme Court, for until the ICC relinquishes jurisdiction, state law determinations of abandonment should not come into play because state law is preempted.

145. *Preseault*, 100 F.3d at 1565 (Clevenger, J., dissenting). It is important to note that the plurality would find a taking in the *Preseault* case because the railroad had abandoned its easement in 1975, and hence the land had reverted back to the landowners, even though the ICC did not issue an abandonment certificate to the railroad until 1985 when it issued an NITU that allowed conversion of the easement to trail use.

146. The Preseaults have litigated their rights twice to the Vermont Supreme Court, once to the U.S. Supreme Court, and then appealed from the Court of Claims.

refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved—*though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.*"[147] Hence, converting a pre-existing easement into a permanent one might not be a taking.

In addition, what this case best illustrates is the vagueness of the term, abandonment. Until these trail conversion cases, it was unnecessary in many cases to distinguish between the railroads' rights to operate and their underlying property rights to the land along their corridors because few people cared about the land once rail service ceased. The ICC's power to regulate the operation and abandonment of railroad services is really about power to regulate services, not railroad property. Thus, when the ICC grants a certificate of abandonment, which is premised on a finding that the public no longer needs the railway service, the railroad gets the power to discontinue its operations. However, that approval says nothing about the railroad's property interests in its corridors. Under most state property laws, easements are extinguished by nonuse *and* evidence of an intent to relinquish permanently the right-of-way.[148] But a railroad may want to discontinue services yet maintain its property rights in the corridors—perhaps to lease rights to utilities or to control crossings or other trespasses on the property. Railroads may continue to pay taxes or require prior approval from the railroad when a landowner wishes to construct a grade crossing.[149] Case law does not address adequately the divergence between an intent to abandon services and an intent to abandon property rights.

If railbanking is a nationally-recognized goal and railroads need to maintain their easement rights for possible future reactivation, how can discontinuance of railway service alone trigger a termination of the easements? The takings claim should not be directed toward the ICC's power to regulate abandonment, and therein postpone reversionary property rights, because the ICC's power is principally over railroad services, not underlying property interests. (The ICC can, of course, forestall a state law abandonment.) The postponement in property rights that occurs when a railroad chooses to preserve its property rights for future uses, either through an ICC NITU certificate or through a takeover by the state, is not a compensable taking. This is because the servient landowner could have no reasonable expectation that a railroad easement would ever be permanently abandoned. Thus, the reversionary property right depends upon state-law definitions of easement termination, and abandonment of services is insufficient to trigger termination. Thus, because the NTSA simply encourages postponement of reversionary rights through railbanking, which the railroads could do anyway

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147. 505 U.S. 1003, 1028-29 (1992) (emphasis added).

148. *See* Seymour Water Co. v. Lebline, 145 N.E. 764 (Ind. 1924); Brock v. B&M Moster Farms, Inc., 481 N.E.2d 1106 (Ind. Ct. App. 1985); Perry v. Carey, 119 N.E. 1010 (Ind. App. 1918).

149. In fact, this appears to be the case in *Preseault*, in which Vermont, as owner of the easement, discontinued rail service in 1975, but required annual licenses and state approval for the Preseaults to put an at-grade driveway over the easement.

under state easement laws, the federal statute has not effected a taking. If the federal statute only allows the railroad to do that which it already had a right to do, there can be no taking.

CONCLUSION

We have seen from the foregoing analysis that most railway conversions should be straightforward and uneventful. If the railroad owned its corridor in fee simple or as a defeasible fee it may convey that land for a trail conversion without regard to the interests of adjoining landowners. If the railroad has an ambiguous deed and the courts, following standard rules of construction, find that the grantor intended to convey a fee simple, there is again no real legal issue. Only if the railroad acquired an easement do we proceed to examine whether or not the railroad has abandoned its interests. If it has not complied with federal law and obtained an abandonment certificate its easement rights should not be terminated. If it has received an abandonment certificate but the ICC also imposed an interim trail use condition, the state property rights are held in abeyance. And even if the railroad has completely abandoned under federal law, taken up its tracks and ceased operations, it should lose its easement right only if it has clearly manifested its intent to abandon by unequivocal evidence and that abandonment has been consummated. Only then do the interests of the landowners come into play, and only if they can prove a right to the corridor land in their own chain of title.

We should note that these rails-to-trails cases are not going to go away. We have a national policy of railbanking, promoting railbed conversions, and providing for alternative modes of transportation. Moreover, we have a long history of endorsing railroad corridors as national assets, even at the expense of private property rights. It is imperative that each state address these issues through a reexamination of property laws concerning abandonment, termination of easements, and the postponement of reversionary property interests. The Indiana Supreme Court certainly could resolve these matters by clarifying the *Ross* rule (and the public exception), delimiting the parameters of easement terminations, and reinforcing the public policy of railbanking (expressed in sections 8-4.5-1 to -6 of the Indiana Code). The court could facilitate economic growth and development for everyone without infringing property rights. It could modernize the 1964 *Ross* rule to accommodate social realities of the late twentieth and early twenty-first centuries. Although agricultural needs are a high priority in this state, the property gained from these railroad corridors, in many cases, is unfit for crop production because the soil has been removed, compacted, or polluted by railroad uses. But regardless of the social benefits to be gained through trail conversions, we must insure that reasonable efforts are taken to protect the property interests of adjoining landowners. Such efforts need not extend to constructing a ten-foot-high fence to separate the corridor trails from neighbors on each side, but might include signs requesting that trail patrons respect the privacy rights of the adjoining landowners and a monitoring system to insure compliance with appropriate laws and regulations. Trail conversions also should provide adequate parking and access points for patrons who wish to use the trails so they do not inadvertently trespass on the goodwill of their neighbors.

Some may think it unfortunate that social conditions prevent according property rights the sacrosanct status they have had in the past. (This concern, of course, only comes into play where reversionary rights are postponed, not where the adjoining landowners do not have fee simple title.) However, we no longer live in a frontier world in which each man's property rights fenced him in from the intrusions and offenses of the outside world. Urban sprawl and relentless development have placed a premium on the security and serenity of private property rights. But the sprawl and development are unlikely to stop, and the transportation needs of all citizens have changed dramatically in the past fifty years, property laws too must therefore adjust. That is why the common law has survived; its flexibility allows it to keep up with changing needs and values without sacrificing the vital protections and rights that we all require for a truly free society. Trail conversions effect that change in legally and socially beneficial ways.

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NOTES

FIDUCIARY DUTIES OWED BY FROZEN-OUT MINORITY SHAREHOLDERS IN CLOSE CORPORATIONS

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INTRODUCTION

There are thousands of minority shareholders[1] who have had their ownership interests in close corporations[2] rendered worthless as a result of oppressive actions by majority shareholders.[3] The loss to oppressed minority shareholders can be catastrophic.[4] A "national business scandal"[5] has emerged due to the unfair

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1. The person or persons with a minority of shares in a close corporation will be referred to in the plural (minority shareholders) throughout this Note. It should be noted that the term "minority shareholders" is being selected in order to be consistent with the lexicon used in most case law and writings on the subject. However, this author believes that non-controlling shareholders is the more appropriate term, considering that control is the central issue in the determination of whether fiduciary duties are imposed.

2. There is definitional uncertainty as to what constitutes a close corporation, or a closely held corporation. *See* Kelvin H. Dickinson, *Partners in a Corporate Cloak: The Emergence and Legitimacy of the Incorporated Partnership*, 33 AM. U. L. REV. 559, 565 (1984) ("Despite the prevalence of the term 'close corporation' in legal opinions and literature, the term has no clear or commonly accepted meaning."). In this Note, the synonymous terms will refer to "a corporation whose shares are not generally traded in the securities market." 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 1.02 (3d ed. 1994 & Supp. 1996) [hereinafter O'NEAL & THOMPSON, CLOSE CORPORATIONS].

3. *See* F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121, 121 (1987). Also, the person or persons with a majority of shares in a close corporation will be referred to in the plural (majority shareholders) throughout this Note. It should be noted that the term "majority shareholders" is being selected in order to be consistent with the lexicon used in most case law and writings on the subject. However, this author believes that controlling shareholders is the more appropriate term, considering that control is the central issue in the determination of whether fiduciary duties are imposed.

4. *See* 1 O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1.03. *See also infra*

treatment of minority shareholders in close corporations. Consequently, there has been an unabating flow of litigation dealing with the oppression of minority shareholders in close corporations.[6] With only a few exceptions, which will be discussed in this Note,[7] the vast majority of cases[8] address minority shareholders' suits against majority shareholders for oppression. This oppression usually comes in the form of a "freeze-out."[9] The basis for such suits by minority shareholders is that majority shareholders have breached a fiduciary duty owed to the minority shareholders.[10]

This Note addresses the contrary issue of whether frozen-out minority shareholders owe a continuing fiduciary duty to majority shareholders based solely on the minority shareholders' retention of shares in the corporation. Only two decisions have squarely addressed this issue.[11] In *Rexford Rand Corp. v. Ancel*, the fiduciary duty was held to extend beyond a freeze-out, unless minority shareholders rid themselves of ownership of their shares.[12] In *J Bar H, Inc. v. Johnson*,[13] the court concluded that the fiduciary duty ceased when a successful freeze-out was exacted upon minority shareholders, regardless of whether the frozen-out shareholders retained stock in the corporation.[14]

In an attempt to determine which approach to this issue is better, both cases will be analyzed through established legal principles applicable to close corporations, and some general common law principles. An overview of the characteristics of close corporations,[15] the fiduciary duties owed in close corporations,[16] and the elements of a freeze-out[17] will also be discussed.

For whatever reasons, case law analyzing the fiduciary duty minority shareholders owe majority shareholders is sparse. However, the case law which

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notes 93-103 and accompanying text for discussion regarding the extent of the catastrophic loss to minority shareholders.

5. O'Neal, *supra* note 3, at 121.

6. *See id.*

7. *See infra* notes 68-77 and accompanying text.

8. *See* O'Neal, *supra* note 3, at 122 ("[M]uch of corporate practice relating to shareholder disputes is not reflected in case decisions or statutes. Many disputes are settled and thus never appear in court decisions.").

9. *See infra* notes 93-103 and accompanying text.

10. *See* 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 7.03 (2d ed. 1993 & Supp. 1996) [hereinafter O'NEAL & THOMPSON, OPPRESSION].

11. *See* Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1220 (7th Cir. 1995) (noting that prior to that decision, "only one court ha[d] addressed the question of whether a freeze-out terminate[d] a shareholder's fiduciary duty to a close corporation" (citation omitted)).

12. *Id.* at 1220-21.

13. 822 P.2d 849, 862 (Wyo. 1991).

14. *Id.*

15. *See infra* notes 24-45 and accompanying text.

16. *See infra* notes 46-92 and accompanying text.

17. *See infra* notes 93-103 and accompanying text.

does address the minority shareholders' duty leads to the conclusion that, absent an ability to control the activities of a close corporation, a minority shareholder does not owe the same heightened fiduciary duty[18] as that owed by majority shareholders in close corporations.[19] Therefore, despite the *Rexford Rand* holding to the contrary, shareholder status alone should not give rise to fiduciary duties in close corporations. This Note will demonstrate that, absent an ability to control corporate activities, frozen-out minority shareholders should be charged with the same fiduciary duties owed by minority shareholders in public corporations.[20] Thus, as a matter of law, any heightened fiduciary duties owed by minority shareholders in close corporations should cease upon a freeze-out.

This Note will also demonstrate that the doctrine of "unclean hands,"[21] and the fact that a fiduciary duty carries with it a duty not to compete against the corporation,[22] makes application of the *Rexford Rand* decision impractical and contrary to deep-rooted principles of equity. Finally, this Note will demonstrate that the arguments set forth in the *Rexford Rand* decision in support of imposing a fiduciary duty based solely on stock ownership are impractical, and have an unwarranted oppressive effect on minority shareholders.[23]

I. CHARACTERISTICS OF CLOSE CORPORATIONS

Close corporations can be clearly distinguished from publicly held corporations by the fact that shares in close corporations are not publicly traded.[24] In addition to the lack of a public market for the shares, there are several other characteristics that are generally associated with a close corporation.

A. Attributes of a Close Corporation

The typical attributes of a close corporation include:

> (1) the shareholders are few in number, often only two or three; (2) they usually live in the same geographical area, know each other, and are well acquainted with each other's business skills; (3) all or most of the shareholders are active in the business, usually serving as directors or officers or as key participants in some managerial capacity; and (4) there is no established market for the corporate stock, the shares not being listed on a stock exchange or actively dealt in by brokers; little or no trading

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18. *See infra* notes 59-92 and accompanying text.
19. *See infra* notes 55-58 and accompanying text.
20. *See infra* note 150 and accompanying text.
21. *See infra* notes 178-86 and accompanying text.
22. *See infra* notes 187-202 an accompanying text.
23. *See infra* notes 203-33 and accompanying text.
24. *See* Arthur D. Spratlin, Jr., Comment, *Modern Remedies for Oppression in the Closely Held Corporation*, 60 MISS. L.J. 405, 406-07 (1990) (noting that the illiquidity of minority shareholders' shares is one of the leading characteristics of a close corporation).

takes place in the shares.[25]

A shareholder in a close corporation generally "considers himself or herself as a co-owner of the business and wants the privileges and powers that go with ownership."[26] A close corporation often provides the principal or sole source of income for the shareholders.[27] In fact, "[p]roviding for employment may have been the principal reason why the shareholder participated in organizing the corporation."[28] In some instances, a guarantee of employment may have been one of the basic reasons for becoming a shareholder.[29] Shareholders also expect an immediate return on their investment in the form of salaries as officers or employees of the corporation, even in the absence of dividends.[30]

The shareholders are also subject to the ordinary risks of running a business. Because the shareholders in close corporations often share these normal business risks along with the decision-making functions of directors and/or employees, they have been referred to as "shareholder-managers."[31] Generally, there are two or three persons who make all of the policy decisions in a close corporation.[32] As a result, the owners are dependent upon one another for the success of the corporation.[33]

B. Similarity of Close Corporations to Partnerships

Close corporations have been analogized[34] and, for some purposes, judicially treated[35] as partnerships. The basis for the comparison is that the characteristics associated with close corporations are generally found in partnerships.[36] Corporate status is elected by the shareholders in order to "'clothe' their partnership 'with the

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25. 1 O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1.08, at 31.

26. *Id.*

27. *See id.*

28. *Id.* at 31-32.

29. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976). *See also* O'Neal, *supra* note 3, at 127 (referring to this decision as "ground-breaking").

30. *See* 1 O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1.08, at 32.

31. *Id.*

32. *See id.* at 33-34 ("A close corporation is usually dominated by two or three persons, often by a single individual, and the key managers generally make all policy decisions and even most of the decisions involved in the day-to-day operation of the business.").

33. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 512 (Mass. 1975).

34. *See id.*

35. *See generally* John R. Van Winkle & Gary R. Welsh, *Origin, Development, and Current Status of Fiduciary Duties in Close Corporations: Has Indiana Adopted a Strict Good Faith Standard?*, 26 IND. L. REV. 1215, 1219-1223 (1993) (discussing the application of partnership principles to close corporations); *but see* Brent Nicholson, *The Fiduciary Duty of Close Corporation Shareholders: A Call for Legislation*, 30 AM. BUS. L.J. 513, 530-32 (1992) (noting problems with the partnership analogy).

36. *See Donahue*, 328 N.E.2d at 512 ("[T]he close corporation bears striking resemblance to a partnership.").

benefits peculiar to a corporation, limited liability, perpetuity and the like.'"[37] When a close corporation is formed, the shareholders often consider themselves partners,[38] but treat the enterprise as a corporation when dealing with others. [39] Flowing from this analogy to partnerships, courts have imposed a fiduciary duty upon shareholders in close corporations similar to the duty general partners owe to each other.[40]

However, some recent criticism has arisen as to the scope and applicability of the partnership analogy.[41] Specifically, "[i]t is unclear how far the partnership analogy extends in close corporation law."[42] This lack of clarity occurs because

> [b]y failing to complete the partnership analogy, courts subject close corporation shareholders to a guessing game of which partnership attributes will be imputed and which will not. There is little indication that courts have considered these issues. It appears they have borrowed a usable tool to formulate an attractive and popular result without regard for the implications.[43]

Therefore, the partnership analogy, when not fully analyzed by a court applying it, may be dangerous, particularly when used selectively.[44] Nonetheless, despite the uncertainty of the partnership analogy in some circumstances, as a whole, the analogy is still widely recognized.[45]

II. NATURE OF THE FIDUCIARY DUTY

Officers, directors, and majority shareholders in public corporations[46] owe

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37. *Id.* (quoting *In re* Approved Bus. Mach. Co., 286 N.Y.S.2d 580, 581 (N.Y. Sup. Ct. 1967)).

38. *See* 1 O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1.08, at 31 ("[B]usiness participants forming a close corporation not uncommonly consider themselves partners as to each other. They adopt the corporate form of business to obtain limited liability or some other real or fancied corporate advantage; they may think of their business as a corporation in its dealings with outsiders, but among themselves they are still 'partners.'").

39. *See id.*

40. *See* Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and its Impact upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 426-27 (1990).

41. *See generally* Nicholson, *supra* note 35, at 530-32 (arguing that the partnership analogy is deficient in certain applications).

42. *Id.* at 530.

43. *Id.* at 531.

44. *See id.* at 532.

45. *See* 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.03, at 13 ("In decisions relating to [close] corporations, courts frequently analogize the duties of directors and shareholders to those of partners in a partnership.") (footnote omitted).

46. For purposes of this Note, the term, public corporations, refers to all corporations which are not close corporations.

fiduciary duties in certain circumstances.[47] In close corporations, for the reasons set forth below, majority shareholders have been held to a "heightened fiduciary duty"[48] that imposes a greater burden on them than their counterparts in public corporations.

A. Trust, Confidence, Absolute Loyalty

It is commonly held that shareholders in a close corporation have upheld their heightened fiduciary duty if they have behaved toward one another with the utmost good faith and loyalty.[49] Professor Lawrence E. Mitchell has defined and characterized the intricacies of a fiduciary relationship as:

> [A] relationship of power and dependency in which the dependent party relies upon the power holder to conduct some aspect of a dependent's life over which the power holder has been given and accepted responsibility. The dependent, for a variety of reasons, has limited (or had limited to her) control over one or more aspects of her personal or economic life. The power holder is charged with assuming the power abdicated by (or not granted to) the dependent in the manner she deems will best fulfill her responsibility. The power holder has, in some sense, voluntarily undertaken the responsibilities with which she has been charged. The dependent's reliance upon the power holder or, not quite conversely, the power holder's service as a surrogate for the dependent, characterizes the fiduciary relationship.[50]

In exercising this power, the power holder must act in the dependent's best interest.[51] In the close corporation setting, the majority shareholder is the power holder, and the minority shareholder the dependent. When the power holder and the dependent share ownership interests in the property around which the relationship exits, such as majority and minority shareholders in close corporations, the ability of the power holder to exercise judgment independent of personal interests is strained.[52]

Despite these strained interests, in the context of close corporations:

> Stockholders . . . must discharge their management and stockholder responsibilities in conformity with [a] strict good faith standard. They

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47. See *infra* notes 55-92 and accompanying text for discussion concerning the scope and applicability of these duties.

48. *See* 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.03, at 13 ("[C]ourts have held those in control of a closely held corporation . . . to a very strict standard of fiduciary obligation."). Throughout this Note, "heightened fiduciary duty" will be used to refer to this strict fiduciary duty imposed on controlling shareholders in close corporations.

49. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975).

50. Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1684 (1990) (citations omitted).

51. *See id.* at 1685-86.

52. *See id.* at 1687.

> may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation. . . . *[C]ontrast this strict good faith standard with the somewhat less stringent standard of fiduciary duty to which directors and stockholders of all corporations must adhere in the discharge of their corporate responsibilities.*[53]

The heightened fiduciary duty in close corporations has been extended not only to management, officers and directors, but also to shareholders *who are able to control* the corporation's activities.[54] As the following two sections will show, the circumstances in which fiduciary duties are imposed upon minority and majority shareholders differ. This difference depends upon an ability to exercise control over corporate activities.

B. Majority's Duty to the Minority is Clearly Defined

Majority stockholders, by virtue of the fact that they own at least a majority of the shares in a corporation, maintain a position of control over the corporation. When majority shareholders exercise that control, they stand in a fiduciary relationship with the corporation and the minority shareholders.[55] In *Donahue v. Rodd Electrotype Co.*, the leading case on this issue, the court held that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another."[56] Professor F. Hodge O'Neal noted:

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53. *Donahue*, 328 N.E.2d at 515-16 (emphasis added). *See also* J.A.C. Hetherington, *The Minority's Duty of Loyalty in Close Corporations*, 1972 DUKE L.J. 921, 922 n.4 (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (1928)) ("The classic expression of the duty of loyalty among co-adventurers is Judge Cardozo's comment: 'Not honesty alone, but the punctilio of an honor the most sensitive, is . . . the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.'"); Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 4 BUS. LAW. 699, 728 (1992) ("Differences as to the scope and meaning of the fiduciary duties under a *Donahue* standard do not detract from its widespread acceptance.").

54. *See Donahue*, 328 N.E.2d at 515 n.17 ("We do not limit our holding to majority stockholders. In the close corporation, the minority may do equal damage through unscrupulous and improper 'sharp dealings' with an unsuspecting majority.") (citation omitted); *See also* 3 WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 844.20, at 219 (1994 & Supp. 1996) ("[C]lose corporation shareholders, as such, stand in fiduciary relationship to each other."); Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 661 (Mass. 1976) (quoting *Donahue*, 328 N.E.2d at 515) (reaffirming the *Donahue* decision, that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another."); Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995) ("[A] shareholder in a close corporation owes a duty of loyalty to the corporation and to the other shareholders.").

55. *See* 12B FLETCHER, *supra* note 54, § 5811, at 155 ("[Majority stockholders] sustain a fiduciary relation to the holders of the minority stock and the corporation.").

56. *Donahue*, 328 N.E.2d at 515.

> In the corporate setting, the inquiry into fiduciary obligation has produced general agreement that directors and officers stand in a fiduciary relationship to the corporation. . . . There is also a growing recognition that *controlling* shareholders stand in a fiduciary relationship to the corporation and to minority shareholders. . . . [C]ourts require controlling shareholders to exercise their powers in good faith and in a way that does not oppress the minority.[57]

These sources lead to the conclusion that majority shareholders in a close corporation owe a heightened fiduciary duty to the corporation, and to the other shareholders in the corporation. This conclusion is the rule in most jurisdictions.[58]

C. Scope of Minority's Duty is Unclear

1. Minority Shareholders Owe a Fiduciary Duty When Able to Exercise Control Over Corporate Activities.—A fiduciary duty is sometimes imposed on minority shareholders towards majority shareholders, and to a corporation, when minority shareholders are able to exercise a degree of control over a corporation's activities.[59] Because majority shareholders' fiduciary duties are imposed as a safeguard against abuse of the control inherent in the stockholders' positions as the majority, when minority shareholders are able to exercise similar control, a fiduciary duty is likewise imposed. Professor J.A.C. Hetherington, in a widely cited article, noted:

> A shareholder who himself has some ulterior purpose in view may exercise his rights as an owner of stock in a way which is, and is intended to be, detrimental to the business interests of the corporation or the other shareholders. However, an adverse interest becomes important only when the shareholder's vote determines the outcome of a corporate issue. When the vote of any shareholder is decisive on any question, he is to that extent in control of the corporation. . . . *As soon as the minority has a degree of control over corporate decision making, however, the question arises as to whether it should not also be subject to a duty of loyalty comparable to that routinely borne by the majority and controlling shareholders.*[60]

Professor Hetherington noted further that "the policies underlying the fiduciary responsibilities imposed on those who have control should be applicable to any

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57. 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.03, at 11 (footnotes omitted) (emphasis added).

58. *See* L. Clark Hicks, Jr., Comment, *Corporations--Fiduciary Duty--In a Close Corporation, a Majority Shareholder Owes a Fiduciary Duty Towards the Minority When Seeking a Controlling Share*, 60 MISS. L.J. 425, 435 (1990) ("Most jurisdictions now follow the rule that controlling and majority shareholders owe a fiduciary duty to the minority shareholder, particularly in the context of a close corporation.") (citations omitted).

59. *See* 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.03, at 11.

60. Hetherington, *supra* note 53, at 934-35 (emphasis added).

shareholder whose vote or other conduct as a shareholder is in fact controlling in a particular situation."[61] To further support Professor Hetherington's proposition, Professor Mitchell stated that the imposition of a fiduciary duty is a substitute for control.[62] Therefore, absent an ability to control corporate activities, no heightened fiduciary duty arises.

Control can be invested in the minority by veto power,[63] by their positions as managers and directors, or in any other situation in which the minority shareholders can exercise such power over the majority.[64] Situations can arise in which, individually, minority shareholders do not possess the requisite control necessary to result in imposition of a fiduciary duty, but collectively, a group of minority shareholders form a "control group"[65] and, therefore, have a fiduciary duty imposed. Further, through "unscrupulous and improper 'sharp dealings,'" the minority can be held to owe a fiduciary duty to the majority.[66] However, unlike majority shareholders, who by virtue of their status as the majority necessarily exert control any time they engage in corporate activities, minority shareholders owe this fiduciary duty only in certain circumstances.[67]

2. *Absent an Ability to Control Corporate Activities, a Minority Shareholder Should Not Owe a Heightened Fiduciary Duty.*—Whether a minority shareholder, who possesses no control over the corporation, owes a fiduciary duty to the majority, is not clearly defined in the law. There appears to be no case law, or treatise, which *directly* states that minority shareholders in a close corporation do not owe a heightened fiduciary duty to the corporation and the other shareholders unless they exercise control over the corporation's activities. Rather, there are several cases, whose holdings or dicta lead to this conclusion.

The statement in *Rexford Rand* that "minority shareholders owe a duty of

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61. *Id.* at 946.

62. *See* Mitchell, *supra* note 50, at 1729.

63. *See* Smith v. Atlantic Properties, Inc., 422 N.E.2d 798, 802 (Mass. App. Ct. 1981) (minority stockholder exerted control by means of a veto provision).

64. *See* Hetherington, *supra* note 53, at 946.

65. In a recent Massachusetts case, the issue arose whether two minority shareholders who were not involved in the management or operations of a corporation owed a fiduciary duty to the corporation or another minority shareholder. Demoulas v. Demoulas Super Mkts., Inc., 677 N.E.2d 159 (Mass. 1997). In *Demoulas*, the trial court held that the minority shareholders accused of breaching a fiduciary duty towards the majority comprised a "control group" which had enough control over the corporation to result in imposition of a fiduciary duty. Demoulas v. Demoulas Super Mkts., Civ. A. No. 90-2927(B), 1995 WL 476772, at *80 (Mass. Super. Ct. Aug. 2, 1995), *amended and remanded*, 677 N.E.2d 159 (Mass. 1997). The court then defined a "control group" as "a group of persons who act in concert to exercise a controlling influence over the management or policies of a business organization pursuant to an arrangement or understanding with each other." *Id.* at *81 (citing ALI, PRINCIPLES OF CORPORATE GOVERNANCE § 1.09 (1994)).

66. Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 n.17 (Mass. 1975) (citation omitted) (the fiduciary duty was not limited only to the majority, because minority shareholders could do damage to unsuspecting majority shareholders).

67. *See* Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1219 (7th Cir. 1995).

loyalty to a close corporation *in certain circumstances*,"[68] implies that in other circumstances there is no such duty of loyalty. In a close corporation context, "[t]he relationship between stockholders . . . is not always a fiduciary one."[69] Although case law regarding the minority shareholders' fiduciary duty owed to a majority is limited, those cases that have dealt with the issue have almost uniformly tied the fiduciary duty of the minority shareholders to an ability to control some aspect of the corporation's activities.[70]

The most widely cited example[71] of this relationship is *Smith v. Atlantic Properties, Inc.*[72] In *Smith*, a minority shareholder[73] in a close corporation possessed the ability to veto actions denied by the remaining shareholders. The court held that this level of control over the corporation's actions had "substantially the effect of reversing the usual roles of the majority and the minority shareholders."[74] The veto provision provided the otherwise non-controlling shareholder with an "ad hoc controlling interest."[75] As a result, the minority shareholder owed a fiduciary duty to the majority, and his failure to use this veto power reasonably was a breach of his fiduciary duty.[76] The controlling interest provided by the veto provision was the basis for imposing the heightened fiduciary duty usually owed by majority shareholders in close corporations. Other cases addressing the same issue have reached the same conclusion.[77]

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68. *Id.* at 1219 (emphasis added). See *infra* notes 118-32 for overview of the facts and holding of the *Rexford Rand* decision.

69. Schoellkopf v. Pledger, 739 S.W.2d 914, 920 (Tex. App. 1987), *rev'd on other grounds*, 762 S.W.2d 145 (Tex. 1988) (per curiam) (footnote omitted).

70. *See e.g.*, Ellis & Marshall Assoc. v. Marshall, 306 N.E.2d 712 (Ill. App. Ct. 1973). No fiduciary duty was imposed on a resigned 35% shareholder in a close corporation who retained his shares after resigning and competing with his former employer. The decision was based on the fact that by resigning his posts as an officer and director of the corporation, the shareholder had no duty not to compete; the decision did not even allude to any fiduciary duty owed solely as a result of being a shareholder. *See id.* at 716-17.

71. *See* Mitchell, *supra* note 50, at 1699 ("A good starting point for analyzing the recent jurisprudence of fiduciary duty in the close corporation context is the famous Massachusetts trilogy . . . [which includes] *Smith v. Atlantic Properties, Inc.*").

72. 422 N.E.2d 798 (Mass. App. Ct. 1981).

73. The minority shareholder at issue owned 25% of the close corporation. *Id.* at 799.

74. *Id.* at 802.

75. *Id.*

76. *See id.* at 803.

77. *See* Baylor v. Jordan, 445 So. 2d 254, 256 (Ala. 1984) (recognizing that two *equal* shareholders, who possess *equal* bargaining power do not, based solely on their status as shareholders, owe each other a fiduciary duty); Zimmerman v. Bogoff, 524 N.E.2d 849 (Mass. 1988) (a 50% shareholder owed a fiduciary duty due to his ability to control the corporation's finances); Johns v. Caldwell, 601 S.W.2d 37, 41-42 (Tenn. Ct. App. 1980). The decision contrasts the fiduciary relationships owed by directors, officers, and majority shareholders with those of minority shareholders, noting that there was no authority submitted to the court "stating that a minority stockholder stands in a fiduciary relationship to a majority stockholder" in a close

Other case law, in dicta, has noted that a fiduciary duty is only owed when a minority shareholder possesses some level of control over the corporation's activities. In *Cain v. Cain,*[78] a 50% shareholder in a close corporation, who was an officer and director, breached his fiduciary duty by establishing a competing business.[79] The *Cain* decision specifically noted that a determination of fiduciary duties of controlling shareholders did not relate to the issue of whether uninvolved minority shareholders owed fiduciary duties in similar circumstances.[80] In *Demoulas v. Demoulas Super Markets, Inc.*,[81] it was recognized that "minority shareholders *who exercise some form of control over the corporation* to the detriment of the majority shareholders owe fiduciary duties to the corporation."[82] Implied in the statements that shareholders who exercised control owe fiduciary duties, is the conclusion that minority shareholders who do not exercise control do not owe the heightened fiduciary duties normally owed by majority shareholders in close corporations. Otherwise, the courts' analysis in the aforementioned decisions would have been moot, and they need only have stated that as a matter of law all shareholders in close corporations owe fiduciary duties to each other.

Further, in addressing the scope of the heightened fiduciary duties owed in close corporations, the U.S. Supreme Court has defined the scope of the duty in terms of those shareholders who are in a controlling or majority position. In *United States v. Byrum*[83] the Supreme Court stated that "[t]he obligation of the majority or of the dominant group of shareholders acting for, or through, the corporation is fiduciary in nature."[84] In *Southern Pacific Co. v. Bogert*,[85] the Court stated the general rationale underlying the rule of fiduciary duties in the corporate context:

> [T]he doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustee for the

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corporation. *Id.* at 42. Therefore, because the selling of stock by a minority shareholder was not a corporate function, a minority shareholder did not owe a fellow shareholder a fiduciary duty when selling his stock. *Id.*; Kaspar v. Thorne, 755 S.W.2d 151, 155 (Tex. App. 1988, no writ) (holding that non-controlling shareholders in a close corporation, as a matter of law, do not owe a fiduciary duty to the other shareholders); Schoellkopf v. Pledger, 739 S.W.2d 914, 920 (Tex. App. 1987), *rev'd on other grounds*, 762 S.W.2d 145 (Tex. 1988) (per curiam) (holding that although a fiduciary duty may exist in some circumstances, it does not apply as a matter of law to all shareholders of a close corporation).

78. 334 N.E.2d 650 (Mass. App. Ct. 1975).

79. *Id.* at 655, 656 n.1.

80. *Id.* ("We are not here concerned with a minority stockholder not involved in management.").

81. Civ. A. No. 90-2927(B), 1995 WL 476772 (Mass. Super. Ct., Aug. 2, 1995), *amended and remanded*, 677 N.E.2d 159 (Mass. 1997).

82. *Id.* at *80.

83. 408 U.S. 125 (1972).

84. *Id.* at 138 n.11 (quoting 13 OHIO JUR. 2D, *Corporations* § 662, at 90-91).

85. 250 U.S. 483 (1919).

> minority does not rest upon . . . technical distinctions. It is the fact of *control* of the common property held and exercised, not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation.[86]

Finally, because the vast majority of cases deal with the majority shareholders' duties to oppressed minority shareholders, case law is often worded in broadly sweeping language to the effect that all shareholders in a close corporation owe a fiduciary duty to each other. Many cases take their lead in this regard from the *Donahue v. Rodd Electrotype Co.*[87] decision, which stated that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another."[88] Too often, this statement is read without reference to two essential footnotes. Footnote seventeen of the *Donahue* decision notes that the court did not limit its holding to majority stockholders because minority shareholders can "do equal damage through unscrupulous and improper 'sharp dealings' with an unsuspecting majority."[89] In footnote eighteen, the court in *Donahue* stressed that the strict fiduciary duty they applied to stockholders in a close corporation "*governs only their actions relative to the operations of the enterprise and the effects of that operation on the rights and investments of other stockholders.*"[90] Read together, these footnotes stand for the proposition that only when minority shareholders have the ability to control the actions of a corporation, based on their status as shareholders, do they owe a heightened fiduciary duty to the corporation and the other shareholders. When majority shareholders' actions are being scrutinized for possible oppression, the ability to control the activities of the corporation is a "given" and rarely acknowledged in a court's discussion regarding the reason for imposing a fiduciary duty upon majority shareholders. However, in cases addressing whether a minority shareholder owes a fiduciary duty to majority shareholders, most courts base their decisions on whether the minority shareholder has control over the corporation's activities.

These authorities clearly suggest that, absent an ability to control the activities of a close corporation, minority shareholders do not owe the same heightened fiduciary duty[91] imposed on controlling shareholders in close corporations. However, when exercising control over corporate activities based on their status as shareholders, minority shareholders owe to the corporation and the other shareholders a heightened fiduciary duty equivalent to that imposed on majority shareholders in close corporations.[92]

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86. *Id.* at 492 (emphasis added).
87. 328 N.E.2d 505 (Mass. 1975).
88. *Id.* at 515.
89. *Id.* at 515 n.17 (citation omitted).
90. *Id.* at 515 n.18 (emphasis added).
91. *See supra* notes 48-54 and accompanying text.
92. *See supra* notes 55-58 and accompanying text.

III. "FREEZE-OUT" DEFINED

The very nature of the minority shareholder's lack of control over the corporation makes the minority vulnerable to the majority.[93] Although the corporate form provides the shareholders in a corporation with limited liability and other benefits, "it also supplies an opportunity for the majority stockholders to oppress or disadvantage minority stockholders."[94] This oppression or disadvantage is generally manifested by the majority "freezing-out" the minority shareholders.

Professor O'Neal set forth the generally accepted definition:[95]

> By the term "freeze-out" is meant the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants.[96]

The effect of a "freeze-out" on a minority shareholder can be "catastrophic":[97]

> He may be deprived of any effective voice in the making of business decisions. Not only that, he may be locked out of the company's premises; and the majority participants may be able to withhold from him information on the affairs of the business and on policies being adopted and decisions being made. . . . Quite commonly when a participant invests in a close corporation he expects to work in the business on a full-time basis. He may put practically everything he owns into the business and expect to support himself from the salary he receives as a key employee of the company. Whenever a shareholder is deprived of employment by the corporation (as he frequently is in these squeeze-

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93. *See Donahue*, 328 N.E.2d at 513 ("The minority is vulnerable to a variety of oppressive devices termed 'freeze outs' which the majority may employ.").

94. *Id.*

95. Although there are other definitions of "freeze-out," Professor O'Neal's is frequently referred to in cases. *See* Murdock, *supra* note 40, at 425 n.4 ("'Freeze-out'. . . denote[s] the situation in which a minority shareholder retains his or her interest but is deprived either of employment or of dividends such that he or she is unable to realize any return on the investment in the close corporation."). *See also* Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1217 n.3 (7th Cir. 1995) (quoting Fleming v. International Pizza Supply Corp., 640 N.E.2d 1077, 1080 n.4 (Ind. Ct. App. 1994), *vacated*, 676 N.E.2d 1051 (Ind. 1997) (citation omitted)):

> The term "freeze-out" refers to "the use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority shareholders from the enterprise or reduce their voting power or claims on corporate assets to relative insignificance. A freeze-out implies a purpose to force upon the minority shareholder a change which is not incident to any other corporate business goal."

Finally, in the context of this issue, "squeeze-out" is synonymous with "freeze-out."

96. 1 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 1.01.

97. *Id.* § 1.03.

> plays) he may be in effect deprived of his principal means of livelihood. A shareholder may also find that his investment in the enterprise has become practically valueless.[98]

Some common methods of exacting a "freeze-out" upon minority shareholders are the withholding of dividends,[99] draining off the corporation's earnings,[100] depriving minority shareholders of corporate offices and employment,[101] organizing a new corporation with the old corporation's assets, leaving the minority with shares in an assetless corporation,[102] and bringing about a merger unfair to minority shareholders.[103] All of these techniques are possible due to the control majority shareholders possess over the minority shareholders and the corporation.

IV. CASES AT ISSUE

A. J Bar H, Inc. v. Johnson

In *J Bar H, Inc. v. Johnson*,[104] the Wyoming Supreme Court addressed, for the first time in any reported case in the United States,[105] the issue of whether a freeze-out exacted upon minority shareholders terminates any heightened fiduciary duties minority shareholders owe to a close corporation. In *J Bar H*, Johnson, a minority shareholder,[106] and two other shareholders who constituted a majority,[107] owned a game processing company. The active majority shareholder[108] was the

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98. *Id.*

99. *See* O'Neal, *supra* note 3, at 125.

100. *See id.* (This can occur by a majority shareholder paying "[e]xorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, high rentals for property the corporation leases from majority shareholders, and unreasonable payments to majority shareholders under contracts between the corporation and majority shareholders or companies the majority shareholders own. . . .").

101. *See id.*

102. *See id.*

103. *See id.*

104. 822 P.2d 849 (Wyo. 1991).

105. *See* Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1220 (7th Cir. 1995) ("Our research indicates that only one court [referring to the Wyoming Supreme Court in *J Bar H, Inc. v. Johnson*] has addressed the question of whether a freeze-out terminates a shareholder's fiduciary duty to a close corporation.").

106. *J Bar H*, 822 P.2d at 859-60 (although not technically a "minority shareholder" due to 50% ownership of the close corporation's shares, the defendant 50% shareholder was deemed to be a "minority shareholder" due to "the restrictions placed on sale of her shares, and her lack of business acumen relative to that of [the other two shareholders, who between them owned the remaining 50%]").

107. *Id.*

108. Although the case does not directly address the issue, the facts indicate that one of the majority shareholders was not active in corporate activities.

president and treasurer of the corporation, and the minority shareholder was the vice president and secretary. Managerial duties were apportioned between the minority shareholder and the active majority shareholder.

Within the first two years of operation, financial troubles arose and caused conflict between the minority shareholder and the active majority shareholder. The active majority shareholder began to "squeeze-out" the minority shareholder from managerial control by exercising "unilateral control of the day-to-day business. . . ."[109] These efforts culminated in the termination of the minority shareholder from her employment with the corporation, as well as leaving her with "no active role or operational responsibilities within the corporation."[110] The active majority shareholder claimed the authority to make these decisions by virtue of his position as president of the corporation.

One year later, "frustrated at her lack of control over J Bar H," the minority shareholder set up her own business competing in the same market as J Bar H and solicited business from former J Bar H customers.[111] J Bar H then filed suit against the minority shareholder for damages and injunctive relief. While the suit was pending, the minority shareholder participated in a J Bar H board of directors meeting, which resulted in deadlocks on all issues of importance.

The trial court held that the minority shareholder breached her fiduciary duty to the corporation, but because the active majority shareholder caused the breach, no damages were awarded.[112] The Supreme Court of Wyoming, on review, held that the majority shareholders violated their fiduciary duties to the minority shareholder "when they performed a classic 'squeeze-out. . . .'"[113] The court framed its analysis in the context of whether the "squeeze-out" had any bearing on the minority shareholder's fiduciary duty to the corporation.[114] The decision noted that:

> [T]he fiduciary duty not to compete depends on the ability to exercise the status which creates it. It is not stretching this principle too far to hold that where a shareholder/director/employee of a close corporation has been wrongfully terminated from employment with the corporation and has been unjustly prevented from fulfilling her function as a director or officer, she can no longer be considered to act in a fiduciary capacity for the corporation.[115]

The court then treated the minority shareholder as if she had resigned her offices in the corporation when she was shut out of the exercise of them.[116] Based on that analysis, the *J Bar H* court held that the fiduciary duty owed by minority

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109. *J. Bar H*, 822 P.2d at 853.
110. *Id.*
111. *Id.* at 854.
112. *Id.*
113. *Id.* at 859.
114. *Id.* at 860.
115. *Id.* at 861.
116. *Id.*

shareholders in close corporations is relieved upon a successful "squeeze-out" by majority shareholders.[117]

B. Rexford Rand Corp. v. Ancel

In *Rexford Rand Corp. v. Ancel*,[118] the majority shareholders in a close corporation sued a minority shareholder who, prior to the suit, had been frozen-out[119] of the corporation. The basis of the suit was that the minority shareholder, by reserving the corporation's trade names, had breached a fiduciary duty. The minority shareholder was fired from his positions as vice president, treasurer, and employee of the corporation in 1991. The corporation had never paid a dividend to its shareholders. In 1993, Rexford Rand Corp. neglected to file its annual report, which caused the corporation to be administratively dissolved. The minority shareholder discovered this fact, reserved the names the corporation had been using, and secured a corporate charter in the name of "Rexford Rand Corporation."[120] These actions prohibited Rexford Rand Corp. from operating under its original name, thereby causing the business significant economic impairment.[121]

The trial court ordered the return of the name to the corporation and permanently enjoined the minority shareholder from conducting business under the names previously held by Rexford Rand Corporation.[122] Upon review, the court in *Rexford Rand* noted that:

> [M]inority shareholders owe a duty of loyalty to a close corporation in certain circumstances. Minority shareholders have an obligation as de facto partners in the joint venture not to do damage to the corporate interests. If a minority shareholders [sic] harms the corporation through "unscrupulous and improper 'sharp dealings'" with the majority, he has breached his duty of loyalty.[123]

The court did not believe that the holding in *J Bar H, Inc. v. Johnson*[124] achieved the "optimal result."[125] Moreover, even if the minority shareholder was frozen-out

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117. *Id.*

118. 58 F.3d 1215 (7th Cir. 1995).

119. *Id.* at 1221 n.13. The *Rexford Rand* court proceeded under the premise that the minority shareholder had been frozen-out of the corporation, although a suit was pending at the time of this decision on that issue.

120. *Id.* at 1217.

121. *Id.* at 1218 n.5 (one of the majority shareholders testified that the business would be economically impaired by 80%).

122. *Id.* at 1217.

123. *Id.* at 1219 (quoting Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 n.17 (Mass. 1975) (other citations omitted)).

124. 822 P.2d 849 (Wyo. 1991).

125. *Rexford Rand*, 58 F.3d at 1220.

of the corporation, the minority shareholder did not have a right to appropriate the corporate name in an attempt to gain a favorable settlement with the corporation.[126] The decision linked the heightened fiduciary duty owed by the controlling or majority shareholders[127] with stock ownership.[128]

Unless frozen-out minority shareholders seek a judicial dissolution of the corporation[129] or otherwise rid themselves of stock ownership, the *Rexford Rand* decision imposes a heightened fiduciary duty upon shareholders, regardless of their involvement in or ability to control corporate activities.[130] The court then noted that if, like the minority shareholder in *Rexford Rand*, "shareholders take it upon themselves to retaliate any time they believe they have been frozen out, disputes in close corporations will only increase."[131] The Seventh Circuit, thus, ultimately affirmed the lower court's decision against the minority shareholder.[132]

IV. Reasons for not Imposing a Fiduciary Duty After a Freeze-Out

A. A Fiduciary Duty Depends on the Ability to Exercise the Status Which Creates It: Control

1. *Absent an Ability to Control, No Fiduciary Duty Arises.*—The *J Bar H* court based its decision not to impose a fiduciary duty upon a frozen-out minority shareholder upon the analysis that the "fiduciary duty . . . depends on the ability to exercise the status which creates it."[133] This conclusion was reached after a review of prior case law dealing with fiduciary duties owed by minority shareholders in close corporations and is supported for two reasons.[134] First, the conclusion of the *J Bar H* court, and of other sources to be reviewed in this section, is an extension of the concept that the ability to exercise control over the activities of a corporation is the reason for imposing a fiduciary duty on a shareholder. Second, an analysis of the characteristics of a close corporation also leads to the conclusion that, absent any control over the corporation, there should not be a fiduciary duty imposed on a shareholder.

The court in *Donahue v. Rodd Electrotype Co.* stated that a characteristic of

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126. *Id.* at 1221.

127. *See supra* notes 55-58 and accompanying text.

128. *Rexford Rand,* 58 F.3d at 1220 ("The freeze-out did not deprive [the minority shareholder] of his status as a shareholder . . . and as a shareholder in a close corporation, [the minority shareholder] should have placed the interests of the corporation above his personal interests.").

129. *See id.* at 1221 ("[A]ggrieved parties should take their claims to court and seek judicial resolution.").

130. *See id.* at 1220-21.

131. *Id.* at 1221.

132. *Id.*

133. *See* J Bar H, Inc. v. Johnson, 822 P.2d 849, 861 (Wyo. 1991).

134. *See id.* at 860-61.

a close corporation is that "ownership and management are in the same hands."[135] Out of this arrangement, a fiduciary duty similar to a partnership is imposed on the participants.[136] The origin of the fiduciary duty owed in a partnership is the "entrustment to the partners of substantial control over the interests of their co-partners."[137] Therefore, when a partner has withdrawn from the partnership and no longer has an ability to control the partnership's activities, as long as the withdrawing partner retains no economic interest in the partnership, the withdrawing partner no longer owes a fiduciary duty to the partnership.[138]

A significant difference between a partnership and a close corporation is that "[i]n a partnership, a member of the firm can withdraw his share of the firm's capital and earnings at any time by exercising his right to dissolve the partnership,"[139] whereas frozen-out shareholders in close corporations generally have no readily accessible market for their shares,[140] and are usually only able to sell their shares to the very people who forced them to withdraw from active participation in the corporation.[141] Professor O'Neal stated,

> An important cause of dissension in close corporations is the difficulty an unhappy minority shareholder has in disposing of his interest. Usually the only prospective purchasers of a minority interest in a close corporation are the other shareholders of the corporation, which of course is under the control of the other shareholders. If the other shareholders refuse to buy or offer only a token purchase price, the unhappy shareholder is "locked" into the corporation.[142]

The *Rexford Rand* court makes dangerous use of the partnership analogy[143] by failing to consider the aforementioned issues[144] in concluding that shareholder

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135. 328 N.E.2d 505, 511 (Mass. 1975).

136. *See id.* at 512.

137. 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP § 6.07, at 6:73 (1994 & Supp. 1995). See also *id.* at 6:71, for reinforcement of the proposition that a fiduciary duty arises from an ability to control the enterprise: "[T]he duties of a general partner in a limited partnership have been held to be somewhat more intense than those of a general partner in a general partnership, *because the limited partners do not directly participate in management.*" (emphasis added).

138. *See* J. WILLIAM CALLISON, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 12.09, at 12-23 (1992 & Supp. 1993).

139. 1 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, at § 2.15.

140. *See id.* § 2.15 (noting that there is not a readily accessible market for minority shareholders' shares).

141. *See id.* ("Often the only prospective buyer of a minority interest in a close corporation is the majority shareholder.").

142. O'Neal, *supra*, note 3, at 123.

143. *See* Nicholson, *supra* note 35, at 535 ("The use of the partnership analogy is dangerous because it is incomplete and deceptive.").

144. *See supra* notes 137-41 and accompanying text.

status, standing alone, creates a fiduciary duty owed by minority shareholders in close corporations. In *Rexford Rand, Hagshenas v. Gaylord*[145] is cited as authority for the proposition that "a shareholder in a close corporation owes a duty of loyalty to the corporation and to the other shareholders."[146] The court in *Rexford Rand,* however, did not analyze the reason for imposing these heightened fiduciary duties in the same manner as did the court in *Hagshenas.* In *Hagshenas*, despite imposing a fiduciary duty on a 50% shareholder, the duty was not imposed solely because of the shareholder's stock ownership. The court in *Hagshenas* stated:

> We are not persuaded that [the 50% shareholder's] resignation as an officer and director relieved him of his fiduciary duty. We recognize that, after his resignation, [the 50% shareholder] was not involved in sales, management, or other [corporate] day-to-day operations. By maintaining his 50% ownership interest, however, [the 50% shareholder] retained significant *control over* [*the corporation*]. . . . He did not purport to *give up this control when he resigned.*[147]

The clear implication of these statements is that had the shareholder, upon resigning, given up the ability to control corporate activities, the heightened fiduciary duty that attaches to controlling or majority shareholders would cease to apply to the shareholder. The *Rexford Rand* court appears to have "borrowed a suitable tool to formulate an attractive . . . result without regard for the implications."[148] Thus, as the *J Bar H* court concludes, absent an ability to control the corporation, the reason for imposing a fiduciary duty is not present, and no heightened fiduciary duty is imposed on frozen-out minority shareholders.[149]

2. *Minority Shareholder Status, Without More, Should Not Result in a Fiduciary Duty.*—At issue is whether frozen-out minority shareholders with no ability to exert control over a corporation's activities should have a continuing fiduciary duty to the corporation just because they own shares in the corporation. Does shareholder status, standing alone, create a level of control in a close corporation such that a heightened fiduciary duty should be imposed on frozen-out minority shareholders? Ordinarily, in public corporations, shareholder status alone does not result in imposition of such a duty.[150] One exception to this rule occurs when a majority or controlling shareholder in a publicly held corporation

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145. 557 N.E.2d 316 (Ill. App. Ct. 1990).

146. Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995) (citing *Hagshenas*, 557 N.E.2d at 316).

147. *Hagshenas*, 557 N.E.2d at 323 (emphasis added).

148. Nicholson, *supra* note 35, at 531 (footnotes omitted).

149. J Bar H, Inc. v. Johnson, 822 P.2d 849, 861 (Wyo. 1991).

150. *See* Mairs v. Madden, 30 N.E.2d 242, 244 (Mass. 1940) ("Mere ownership of stock does not create a fiduciary relation between the stockholders."). *See also* 12B FLETCHER, *supra* note 54, § 5811, at 155 ("A stockholder, even though he owns a majority of the stock, does not occupy a trust relation towards the other stockholders *merely* because of his holding of such stock. . . . ") (emphasis added).

"exercises actual control and direction over corporate management."[151] A fiduciary duty is also imposed on a majority shareholder in certain other circumstances,[152] such as "when exercising the corporate right to redeem shares,"[153] and when a majority stockholder dominates control of a majority of the board of directors.[154]

This duty "arises from the exercise of power with respect to the corporation, so that it is only when a person affirmatively undertakes to dictate the destiny of the corporation that he assumes such a fiduciary duty."[155] In publicly held corporations, even a minority shareholder can be deemed to owe a fiduciary duty, under certain circumstances.[156] When minority shareholders in a publicly held corporation exert some control over the corporation, they can be held to owe a fiduciary duty to the corporation arising out of their ability to control corporate activities.[157]

Why, then, should frozen-out minority shareholders who have essentially valueless stock, stock that has no public market, have a greater fiduciary duty than non-controlling stockholders of publicly traded companies? They should not. Because the frozen-out minority shareholders have no control over the corporation and because the shareholders' ability to control corporate actions is the basis for imposition of a fiduciary duty in any corporation, no such heightened duty should exist. Frozen-out minority shareholders should be treated as though they were non-controlling shareholders in a public corporation, who, unless exerting control over corporate activities do not owe a fiduciary duty to the corporation or to the other shareholders.

The *J Bar H*[158] decision that a fiduciary duty "depends on the ability to exercise the status which creates it,"[159] correctly recognizes that when a shareholder loses control over the corporation, the control over the enterprise that was the original basis for imposing a fiduciary duty no longer exists. Shareholder status in public corporations, without more, does not result in imposition of a fiduciary duty. Therefore, frozen-out minority shareholders should not owe fiduciary duties to the venture they have been frozen-out of, and should be treated as if they were non-controlling shareholders in a publicly held corporation.

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151. 18A AM. JUR. 2D *Corporations* § 732, at 601-02 (1985 & Supp. 1996). *See also* 12B FLETCHER, *supra* note 54, § 5811, at 156 ("If a shareholder exercises absolute de facto control over a corporation, such actual dominion carries with it fiduciary responsibility regardless of the presence or absence of de jure titles.").

152. *See* 12B FLETCHER, *supra* note 54, § 5811, at 155.

153. *Id.*

154. *See id.*

155. 18A AM. JUR. 2D *Corporations* § 732, at 602 n.53 (citation omitted).

156. *See* 12B FLETCHER, *supra* note 54, § 5811, at 156.

157. *See id.*

158. J Bar H, Inc. v. Johnson, 822 P.2d 849, 861 (Wyo. 1991).

159. *Id.*

B. In Other Relationships Which Result in Imposition of a Fiduciary Duty, Relinquishment or Termination of the Relationship Terminates the Duty; Why Should Frozen-Out Shareholders of a Close Corporation Be Treated Differently?

The *J Bar H* and *Rexford Rand* decisions treat the relinquishment of corporate directorships, offices, and employment in the close corporation setting differently. The *J Bar H* court treats the frozen-out minority shareholder as a resigned officer and director of the corporation.[160] As a former director and officer, the frozen-out minority shareholder was relieved of her fiduciary duties to the corporation.[161] Unlike *J Bar H*, the court in *Rexford Rand*[162] concludes that unless frozen-out minority shareholders rid themselves of stock ownership, obtain a judicial buy-out of their shares, or obtain a judicial dissolution of the corporation, the fiduciary duty will continue indefinitely.[163] According to the *Rexford Rand* decision, this is the case whether or not the relinquishment of director and officer duties was a result of a freeze-out.[164] Despite the differing analysis in *J Bar H* and *Rexford Rand*, it is indisputable that in both cases the minority shareholders no longer held, for whatever reason, a corporate office, directorship, or position of employment with the corporation at issue in each case. In all other comparable situations, absent an express agreement to the contrary,[165] a fiduciary relationship ceases when the relationship which created it is terminated.[166]

A corporate officer owes a fiduciary duty to the corporation and to the shareholders.[167] "When a corporate officer ceases to act as such, either because of his or her resignation or removal from office, or because of the insolvency of the corporation, the fiduciary relationship ceases."[168] This is also the case in close corporations in which officers have been relieved of their positions.[169] Similarly, a corporate director owes a fiduciary duty to the corporation and to the shareholders.[170] When a corporate director no longer retains that role, the fiduciary

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160. *Id.* at 859.

161. *See id.*

162. *See supra* notes 118-32 and accompanying text.

163. Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1221 (7th Cir. 1995).

164. *Id.* at 1221 n.13 (noting that imposition of a continuing fiduciary duty did not require a determination of whether the minority shareholder's loss of employment, directorship, and officer status was a result of a freeze-out).

165. For example, a non-compete agreement would be an express agreement to the contrary.

166. *See infra* notes 167-77 and accompanying text.

167. *See generally* 18B AM. JUR. 2D *Corporations* §§ 1689-1694 (1985 & Supp. 1997) (discussing fiduciary duties owed by directors, officers, and employees).

168. 3 FLETCHER, *supra* note 54, § 860, at 275.

169. *See* Voss Eng'g, Inc. v. Voss Indus., 481 N.E.2d 63 (Ill. App. Ct. 1985) (holding that resigned corporate officer in a close corporation no longer owed a fiduciary duty to the corporation).

170. 3 FLETCHER, *supra* note 54, § 837.60, at 198. *Also see generally*, Walter R. Hinnant, *Fiduciary Duties of Directors: How Far Do They Go?*, 23 WAKE FOREST L. REV. 163 (1988).

relationship is terminated.[171] This is also the case in close corporations.[172] This proposition receives further support from agency law. In an agency relationship the agent owes a fiduciary duty to the principal;[173] when the agency relationship is terminated, so is the fiduciary duty.[174]

Finally, when a partnership is dissolved, the fiduciary relationship that existed up to the point of dissolution ceases.[175] When partners end their relationship, and there is an agreed upon financial settlement of partnership affairs, the fiduciary duties continue with respect to partnership assets and opportunities that were in place prior to dissolution, but the fiduciary duty is not applicable to new opportunities arising after dissolution.[176] As for a withdrawing partner, the fiduciary relationship owed to the partnership does not exist unless the withdrawing partner has a remaining economic interest in the partnership.[177]

Why then, should a heightened fiduciary duty be imposed on frozen-out minority shareholders long after they have ceased acting in a controlling capacity for the corporation? It should not. Like all other comparable relationships, when frozen-out minority shareholders lose their positions of control within a corporation, their heightened fiduciary duty to the corporation should cease.

C. The Doctrine of "Unclean Hands" Should Bar Judicial Relief for Majority Shareholders Guilty of Freezing-Out Minority Shareholders

The doctrine of "unclean hands" prevents a litigant from obtaining relief by a court of equity "on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue."[178] In particular:

> It means that whenever a party who seeks to set the judicial

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171. *See* 3 FLETCHER, *supra* note 54, § 837.60, at 198.

172. *See supra* note 169 (Resigned corporate directors in close corporations no longer owe fiduciary duties to the corporation.).

173. *See* RESTATEMENT (SECOND) OF AGENCY § 13 (1957).

174. *See id.* § 393.

175. *See* 2 BROMBERG & RIBSTEIN, *supra* note 137, § 7.12, at 7:111 ("In general, partners in a dissolved firm may compete with their former co-partners as long as they account for any appropriation of the goodwill of the dissolved partnership, and as long as the competition does not breach an express or implied noncompetition agreement.").

176. *See* CALLISON, *supra* note 138, § 12.11, at 12-23. *See also* REVISED UNIFORM PARTNERSHIP ACT § 603, cmt. 2 (Sections 603(b)(2) and (3) "clarify a partner's fiduciary duties upon dissociation. *No change from current law is intended.* With respect to the duty of loyalty, the . . . duty not to compete terminates upon dissociation, and the dissociated partner is free immediately to engage in a competitive business, without any further consent.") (emphasis added).

177. *See* CALLISON, *supra* note 138, § 12.11, at 12-23 ("Within limits, a partner may compete with the partnership after he or she has withdrawn from the partnership. However, a partner may not solicit partnership existing clients before he or she leaves the partnership.").

178. 27 AM. JUR. 2D *Equity* § 136, at 667 (1966 & Supp. 1995).

> machinery in motion and obtain some equitable remedy has violated conscience or good faith, or other equitable principles in his prior conduct with reference to the subject in issue, the door of equity will be shut against him notwithstanding the defendant's conduct has been such that in the absence of circumstances supporting the application of the maxim, equity might have awarded relief.[179]

This doctrine is recognized in every state in the United States,[180] and in the District of Columbia.[181] This principle appears applicable if the *Rexford Rand* result of imposing continuing fiduciary duties upon frozen-out minority shareholders solely due to their non-controlling ownership of corporate stock is followed. Such being the case, the frozen-out minority shareholders would have a fiduciary duty to

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179. 27 *id.* § 137, at 670.

180. *See* Foy v. Foy, 447 So. 2d 158, 162 (Ala. 1984); Wilson v. Brown, 897 S.W.2d 546, 549 (Ark. 1995); Knaebel v. Knaebel, 663 P.2d 551, 554 (Alaska 1983); Manning v. Reilly, 408 P.2d 414, 418 (Ariz. Ct. App. 1965); General Elec. Co. v. Alameda Superior Court, 291 P.2d 945, 947 (Cal. 1955); Collens v. New Canaan Water Co., 234 A.2d 825, 833 (Conn. 1967); Bodley v. Jones, 59 A.2d 463, 469 (Del. 1947); Losey v. State, 28 So. 2d 604, 605 (Fla. 1947); Dixon v. Murphy, 385 S.E.2d 408, 409 n.2 (Ga. 1989); Shinn v. Edwin Yee, Ltd., 553 P.2d 733, 743 (Haw. 1976); Gilbert v. Nampa Sch. Dist. No. 131, 657 P.2d 1, 9 (Idaho 1983); Mills v. Susanka, 68 N.E.2d 904, 906 (Ill. 1946); Traylor v. By-Pass 46 Steak House, Inc., 285 N.E.2d 820, 822 (Ind. 1972); Midwest Management Corp. v. Stephens, 353 N.W.2d 76, 81 (Iowa 1984); Goben v. Barry, 676 P.2d 90, 97 (Kan. 1984); Eline Realty Co. v. Foeman, 252 S.W.2d 15, 19 (Ky. Ct. App. 1952); Rhodes v. Miller, 179 So. 430 (La. 1938); Hamm v. Hamm, 584 A.2d 59, 61 (Me. 1990); Adams v. Manown, 615 A.2d 611, 617 (Md. 1992); Amerada Hess Corp. v. Garabedian, 617 N.E.2d 630, 634 (Mass. 1993); Stachnick v. Winkel, 230 N.W.2d 529, 532 (Mich. 1975); Fred O. Watson Co. v. United States Life Ins. Co., 258 N.W.2d 776, 778 (Minn. 1977); O'Neill v. O'Neill, 551 So. 2d 228, 232 (Miss. 1989); Durwood v. H.W. Dubinsky, 361 S.W.2d 779, 791 (Mo. 1962); *In re* Marriage of Lawrence, 642 P.2d 1043, 1049 (Mont. 1982); Marr v. Marr, 515 N.W.2d 118, 120 (Neb. 1994); Tracy v. Capozzi, 642 P.2d 591, 593 (Nev. 1982); Noddin v. Noddin, 455 A.2d 1051, 1053 (N.H. 1983); Faustin v. Lewis, 427 A.2d 1105, 1107 (N.J. 1981); Home Sav. & Loan Ass'n v. W.C. Bates, 417 P.2d 798, 799 (N.M. 1966); Seagirt Realty Corp. v. Chazanof, 196 N.E.2d 254, 255 (N.Y. 1963); Ray v. Norris, 337 S.E.2d 137, 141 (N.C. Ct. App. 1985); Jacobsen v. Pedersen, 190 N.W.2d 1, 4 (N.D. 1971); Goldberger v. Bexley Properties, 448 N.E.2d 1380, 1383 (Ohio 1983); Grim v. Cheatwood, 257 P.2d 1049, 1051 (Okla. 1953); North Pac. Lumber Co. v. Oliver, 596 P.2d 931, 937 (Or. 1979); *In re* Estate of Pedrick, 482 A.2d 215, 222 (Pa. 1984); School Comm. of Pawtucket v. Pawtucket Teachers Alliance, 221 A.2d 806, 815 (R.I. 1966); Arnold v. City of Spartanburg, 23 S.E.2d 735, 738 (S.C. 1943); Miller v. County of Davison, 452 N.W.2d 119, 121 (S.D. 1990); Omohundro v. Matthews, 341 S.W.2d 401, 410 (Tex. 1960); Nielsen v. MFT Leasing, 656 P.2d 454, 456 (Utah 1982); Cook v. Cook, 76 A.2d 593, 597 (Vt. 1950), *rev'd on other grounds*, 342 U.S. 126 (1951); Brown v. Kittle, 303 S.E.2d 864, 867 (Va. 1983); R.C. McKelvie v. Hackney, 360 P.2d 746, 752 (Wash. 1961); Gardner v. Gardner, 110 S.E.2d 495, 502 (W. Va. 1959); S & M Rotogravure Serv., Inc. v. Baer, 252 N.W.2d 913, 918-19 (Wis. 1977); Harsha v. Anastos, 693 P.2d 760, 762 (Wyo. 1985).

181. *See* Ross v. Fierro, 659 A.2d 234, 240 (D.C. 1995).

breach.

The doctrine of "unclean hands" has been applied in cases involving fiduciary duty issues that involved close corporations in which majority shareholders attempted to invoke the defense against breach of fiduciary duty allegations made by minority shareholders.[182] When the doctrine is applied, it is imperative that a plaintiff seeking relief "shall have acted fairly and without fraud or deceit *as to the controversy in issue.*"[183]

Despite the fact that the *Rexford Rand* decision determined that it was irrelevant whether the minority shareholder in that case had been frozen-out,[184] the doctrine of "unclean hands" clearly would have operated as a bar to any relief that the majority shareholders claimed they were entitled to as a result of the minority shareholders breach of fiduciary duty. Both claims arose from the same "controversy in issue,"[185] a breach of fiduciary duty. Therefore, in *Rexford Rand*, had the minority shareholder been allowed to prove that he was first frozen-out of the corporation, the "unclean hands" doctrine should have barred the majority shareholders from claiming that the minority shareholder subsequently breached his fiduciary duty to the corporation. Court decisions[186] clearly support the proposition that the "unclean hands" doctrine should bar relief in all breach-of-fiduciary-duty cases brought by majority shareholders against minority shareholders who, prior to the alleged breach by minority shareholders, were frozen-out of the corporation.

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182. *See* American Family Care, Inc. v. Irwin, 571 So. 2d 1053, 1058 (Ala. 1990) ("[M]isconduct of an officer/director of a corporation is relevant to a claim for breach of fiduciary duty and is relevant to establish a defense of unclean hands."); Knaebel v. Heiner, 663 P.2d 551, 554 (Alaska 1983) ("Unclean hands" doctrine applicable if, on remand, evidence showed that the minority shareholder made an illegal loan to himself.); Jaffe Commercial Fin. Co. v. Harris, 456 N.E.2d 224, 228 (Ill. App. Ct. 1983) (Minority shareholder did not defraud the corporation nor the majority shareholders; therefore, the "unclean hands" doctrine was inapplicable.); W & W Equip. Co. v. Mink, 568 N.E.2d 564, 576 (Ind. Ct. App. 1991) ("Unclean hands" doctrine would have been allowable, although not applicable based on the facts, as a defense for majority shareholders against a "freeze-out" claim by a minority shareholder.); Burack v. Burack, Inc., 524 N.Y.S.2d 457, 460 (N.Y. App. Div. 1988) (Regarding application of the "unclean hands" doctrine: "[W]hen a minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complaint of oppression should relief be barred."); Gunzberg v. Art-Lloyd Metal Prod. Corp., 492 N.Y.S.2d 83, 85 (N.Y. App. Div. 1985) ("Only when a 'minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression' should relief be barred [by the "unclean hands" doctrine].") (citation omitted).

183. *Knaebel*, 663 P.2d at 554 (emphasis added).

184. Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1221 n.13 (7th Cir. 1995).

185. *Knaebel*, 663 P.2d at 554.

186. *See supra* notes 180-85 and accompanying text.

D. To Impose a Continuing Fiduciary Duty Upon a Frozen-out Minority Shareholder Amounts to Imposition of a Life-Long Non-Compete Agreement

One who owes a fiduciary duty to a corporation cannot compete with the corporation.[187] Because the *Rexford Rand* decision ties a fiduciary duty to the ownership of shares,[188] until shareholders get rid of their shares, they owe a continuing fiduciary duty. The result of the *Rexford Rand* decision is that frozen-out minority shareholders owe a continuing fiduciary duty unless they voluntarily sell their shares, or receive assistance from the courts and obtain a forced buyout.[189] Therefore, unlike any other situation,[190] frozen-out shareholders have a continuing obligation not to compete against corporations which terminated their employment, and most likely their primary source of income.[191]

The cumulative effect of the *Rexford Rand* decision places minority shareholders in the position of deciding whether to engage in litigation which would judicially relieve them of the fiduciary duty,[192] or deciding not to engage in the litigation and foregoing the ability to work in what was likely their profession prior to and during their involvement with the corporation[193] from which they were frozen out. If the former decision is made, the fiduciary duty would last as long as the case would take to go to trial or settle. In either event, this represents a great uncertainty as far as time is concerned. If the latter decision is made, the fiduciary duty is apparently owed for the remainder of a minority shareholder's life, unless they are able to sell the shares, which, at best, is a difficult, and likely unprofitable undertaking.[194] Either result is unjust,[195] and is not supported by a

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187. *See generally* David J. Gass, *Departing Directors, Officers and Employees and the Limits of Their Fiduciary Duties*, 72 MICH. B. J. 650 (1993) (discussing the effect of fiduciary duties on the ability of departing directors, officers and employees to compete with their former employers).

188. *Rexford Rand*, 58 F.3d at 1220 ("The freeze-out did not deprive [the minority shareholder] of his status as a shareholder . . . and as a shareholder in a close corporation, [the minority shareholder] should have placed the interests of the corporation above his personal interests.").

189. *Id.* at 1220-21 ("[C]ourts will occasionally order forced buyouts as a remedy for oppression. . . [the frozen-out minority shareholder] should have relied on his suit . . . seeking damages or dissolution of the corporation.").

190. *See supra* notes 160-77 and accompanying text (noting that neither a terminated employee, officer or director of a corporation, nor a withdrawn partner owes a continuing fiduciary duty, in the absence of an express or implied covenant not to compete).

191. *See* 1 O'NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1.08 (a close corporation often provides the principal or sole source of income for the shareholders)

192. See *infra* notes 211-21 and accompanying text for discussion regarding the financial burden such litigation places on the frozen-out minority shareholder.

193. *See* O'Neal, *supra* note 3, at 123 (Typically, a minority shareholder has "developed skill in the particular type of business operated by the corporation.").

194. *See infra* notes 211-21 and accompanying text.

195. *See* 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.13 ("Fiduciary duty and

long standing public policy against imposing non-compete agreements in restraint of trade upon individuals.[196]

Although covenants in restraint of trade are not completely barred, the terms of such an agreement must be reasonable,[197] and as such, cannot "limit competition in any business or restrict the promisor in the exercise of a gainful occupation."[198] To make a non-compete agreement reasonable, the agreement must be limited by the type of activity, the geographical area, and by time.[199] Only one of these three requirements need be absent in an agreement in order for the entire agreement to be deemed unreasonable.[200] If, as the *Rexford Rand* decision would have it, shareholders in close corporations, solely because of their status as stockholders, owe a continuing fiduciary duty to the corporation, the fiduciary duty could be life-long.

Imposing a continuing fiduciary duty based only on the ownership of stock in a close corporation places an unreasonable restriction[201] upon a minority shareholder's ability to earn a living. The court in *J Bar H* held that mere stock ownership in a close corporation by frozen-out minority shareholders does not result in a continuing fiduciary duty such that the frozen-out minority shareholders could not compete with the corporation. Contrary to the *Rexford Rand* decision,[202] the result of the *J Bar H* decision is consistent with the long standing public policy against unreasonable restraint of trade.

VI. Reasons for Continuing the Fiduciary Duty Owed to Majority Shareholders by Frozen-Out Minority Shareholders

The *Rexford Rand* decision has two primary reasons[203] for not holding that minority shareholders' fiduciary duties terminate when they are frozen-out of a close corporation. The first argument is that minority shareholders have a judicial remedy for breach of fiduciary duty available as a means of obtaining relief in the nature of a forced buyout of stock, and that until this remedy is sought, or minority shareholders otherwise rid themselves of share ownership, the fiduciary duty owed

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fairness are necessarily fluid concepts.").

196. *See* Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64, 68 (1873) ("The general rule is that there must be no 'injury to the public by being deprived of the restricted party's industry,' and that the party himself must not be precluded from pursuing this occupation and thus prevented from supporting himself and his family.").

197. *See* Restatement (Second) of Contracts § 186(1) (1981) ("A promise is unenforceable on the grounds of public policy if it is unreasonably in restraint of trade.").

198. *Id.* § 186(2).

199. *See id.* § 188 cmt. d.

200. *See id.*

201. *See id.* There are no temporal limitations on this restriction. Therefore, it is unreasonable.

202. Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1220 (7th Cir. 1995) (stating that it does "not believe that *J Bar H* achieves the optimal result").

203. *Id.* at 1220-21.

to the corporation continues.[204] The second argument is that minority shareholders who engage in "'sharp dealings'"[205] breach their fiduciary duty to the corporation. The first argument can result in great unfairness[206] to the minority shareholder, and the second argument appears to be a misapplication of the law. Neither argument results in a judicially efficient or equitable remedy to this issue.

A. Frozen-Out Minority Shareholders Should Seek a Judicial Remedy

The *Rexford Rand* court held that frozen-out minority shareholders owe a continuing fiduciary duty to a corporation until they relieve themselves of their shares.[207] Unless the minority shareholders are satisfied with damages without release of their stock ownership, which would still result in a continued fiduciary duty to the corporation according to the *Rexford Rand* decision,[208] then they must voluntarily sell, or have a judicial buy-out rid them of their shares.[209] As indicated previously in this Note,[210] the effect of retaining the shares after the freeze-out, according to the *Rexford Rand* decision, would result in a lifelong obligation not to compete with the corporation. However, the judicial remedies available to frozen-out minority shareholders often are not worth the costs and risks the shareholder must assume.

"[T]he path a dissident shareholder must tread to secure rights is strewn with financial and legal hardship of such magnitude few find it worth the effort."[211] Minority shareholders, who did not have the bargaining power or worth at the formation of the corporation to become majority shareholders, must battle majority shareholders and the corporation. The minority shareholders will likely not be able to match the resources employed by the majority shareholders, and thus may forced to settle, or cease prosecuting entirely, due solely to financial considerations. Even if minority shareholders are able to overcome such tactics, the remedies available to them are often inadequate.

The original remedy available to a frozen-out minority shareholder was dissolution of the corporation. However, "corporate dissolution has been judicially viewed as a drastic remedy. . . ."[212] Because of court's general hesitation to order dissolution, three alternative remedies have evolved: "(1) direct judicial

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204. *See id.*

205. *Id.* at 1219 (quoting Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 n.17 (Mass. 1975).

206. *See supra* note 123 and accompanying text.

207. *Rexford Rand*, 58 F.3d at 1220.

208. *See supra* notes 129-31 and accompanying text.

209. *Rexford Rand*, 58 F.3d at 1221 ("[I]f unable to resolve matters amicably, aggrieved parties should take their claims to court and seek judicial resolution.").

210. *See supra* notes 187-202 and accompanying text.

211. 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.01 (quoting A.A. Sommer, Jr., Commissioner, Securities and Exchange Commission, Law Advisory Council, Address, University of Notre Dame School of Law (Nov. 14, 1974)).

212. Murdock, *supra* note 40, at 426.

action, generally by way of injunction, e.g., mandating the declaration of dividends; (2) appointment of a provisional director or custodian; or (3) a judicially ordered buy-out of the minority at a fair price."[213] In relation to the *Rexford Rand* decision, only the remedies of dissolution and the judicially ordered buy-out of the minority at a fair price would relieve minority shareholders of their fiduciary duty to the corporation. Also, these two options generally provide the only permanent solution to the problem.[214]

"The cases in which courts refer to dissolution or liquidation as a drastic remedy, if not legion, are certainly numerous."[215] Therefore, if pursuing a dissolution, minority shareholders face an uphill battle. "Often a court will expressly choose a buyout over dissolution as a less harsh remedy."[216] A buyout requires a judicial determination of fair value of the shares subject to the buyout.[217] Such a determination is not easy. "Invariably, the parties are far apart in their respective views of the value of the business. Often, the 'experts' are equally far apart."[218] Also, the valuation method is essentially conservative[219] and is not an "'exact science.'"[220] Further, "[a]nticipating the buyout of a minority shareholder, majority shareholders and the directors and officers they control may manipulate a corporation's financial records to show no or little book value of assets and low or no earnings."[221] The cumulative effect of these considerations is that frozen-out minority shareholders face a great deal of uncertainty when they decide to attempt to obtain a judicial buy-out of their stock, or a dissolution of the corporation.

The *J Bar H* decision does not require that frozen-out minority shareholders relinquish their stocks in order to rid themselves of a fiduciary duty. Instead, frozen-out minority shareholders are treated as former directors and officers of the corporation, and as such, as a matter of law, they owe no fiduciary duty to the corporation.[222] This provides frozen-out minority shareholders with a choice of either pursuing any of the available remedies,[223] or holding the shares until they become valuable.[224] Either decision can be made without regard to any concern

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213. *Id.* at 427-28.

214. *See id.* at 428 ("[T]he only permanent resolution to the problem would be to eliminate the complaining minority interest. . . .").

215. *Id.* at 440.

216. 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.20.

217. *See id.* § 7.21, at 113. *See generally* Murdock, *supra* note 40 (detailing the various remedies available to minority shareholders, as well as specific methods of evaluating stock).

218. Murdock, *supra* note 40, at 471.

219. *Id.*

220. *Id.* at 472. *See generally* Michael R. Schwenk, Note, *Valuation Problems In The Appraisal Remedy*, 16 CARDOZO L. REV. 649 (1994).

221. 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.21.

222. J Bar H, Inc. v. Johnson, 822 P.2d 849, 861 (Wyo. 1991).

223. *See supra* notes 213-21 and accompanying text.

224. *See* Murdock, *supra,* note 40, at 447 ("There are circumstances . . . in which the minority does not want to 'go out,' at least at the price which is in prospect. . . . [I]f the business is one that might be attractive to a third party buyer, and if conditions are such that the majority might be

over fiduciary duties owed to the corporation. Instead, minority shareholders could base their decision solely on what best serves their financial interest. Further, this result also relieves minority shareholders who have bought into a corporation solely for investment purposes of any fiduciary duties solely due to their share ownership.

The *J Bar H* decision appears to be more equitable than the *Rexford Rand* decision. The former decision allows frozen-out minority shareholders to essentially "wash their hands" of the corporation and continue earning a livelihood, without being forced to relieve themselves of their shares. The latter decision requires frozen-out shareholders to go through an expensive, time consuming ordeal in order to rid themselves of a fiduciary duty, at the end of which they may not obtain a fair value for their investment.

As an additional argument in favor of requiring that frozen-out minority shareholders obtain judicial relief, the *Rexford Rand* decision notes that: "If shareholders take it upon themselves to retaliate any time they believe they have been frozen out, disputes in close corporations will only increase."[225] This argument lends support to the proposition that upon minority shareholders' termination of employment and control over a corporation's actions, like those in other relationships,[226] the fiduciary duty should immediately cease as a matter of law. This would be the most effective means of stopping litigation and conflicts in these situations, not that of requiring frozen-out minority shareholders to engage the judicial system in order to obtain relief.

B. Sharp Dealings by Minority Shareholders

The *Rexford Rand* decision recognizes the established rule that if minority shareholders engage in "unscrupulous and improper 'sharp dealings'"[227] with the majority, they have breached their fiduciary duty.[228] There is little doubt that by obtaining the corporation's trade names the minority shareholder in *Rexford Rand* engaged in unscrupulous activities that would do damage to the corporation.[229] However, assuming that the application of the "sharp dealings" doctrine was correct in the *Rexford Rand* case, the court did not limit its holding to that doctrine.

The *Rexford Rand* court chose not to hold that *because* of the shareholder's sharp dealings a continuing fiduciary duty was imposed. Instead, solely because of his status as a shareholder, the frozen-out minority shareholder owed a broad fiduciary duty, the imposition of which did not relate to the shareholder's ability

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interested in a subsequent sale, the minority might prefer to 'wait it out' rather than be forced to convert its interest currently to cash.").

225. Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1221 (7th Cir. 1995).

226. *See supra* notes 160-77 and accompanying text.

227. Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 n.17 (Mass. 1975).

228. *Rexford Rand*, 58 F.3d at 1219.

229. *Id.* at 1218 n.5 ("[T]he value of the business would be economically impaired by '80 percent'. . . .").

to exercise control over the corporation through unscrupulous and improper "sharp dealings."[230] As such, the *Rexford Rand* decision did not limit the imposition of a fiduciary duty to minority shareholders who engaged in "sharp dealings," but instead imposed a much broader duty which exceeded the scope necessary in order to come to the conclusion that there was a breach of fiduciary duty.

Further, the actions of the minority shareholder in *Rexford Rand* did not arise from his ownership of stock. This is significant in the application of the sharp-dealings doctrine because "[a] shareholder who himself has some ulterior purpose in view may *exercise his rights as an owner of stock* in a way which is, and is intended to be, detrimental to the business interests of the corporation of the other shareholders."[231] Although it is obvious that the minority shareholder's actions were a "troubling"[232] method of obtaining bargaining power, they were not illegal, nor were they tied to ownership of shares. Absent the court-imposed fiduciary duty, there appears to be nothing that could have stopped the minority shareholder from obtaining the names and requiring the corporation to buy the names from him, or face losing the right to the names completely. As a result, although the actions of the minority shareholder in *Rexford Rand* were certainly unscrupulous, they were not tied to the ownership of the stock, and should not have been within the purview of the "sharp dealings" doctrine set forth in *Donahue*.[233]

CONCLUSION

Fiduciary duties of controlling or majority shareholders in close corporations are heightened when compared to other business enterprises, with the exception of partnerships. The origin of a fiduciary duty in close corporations is based on an analogy with the fiduciary duty imposed in partnerships. The fiduciary duty imposed on partners in partnerships is based on the principal that each partner has an ability to control actions of the partnership. It follows that the same should hold true in close corporations; when shareholders lose their ability to exercise control over the corporation, much like a partner withdrawn from a partnership, the reason for imposition of the duty is no longer present, and the fiduciary duty should cease.

The *J Bar H* decision recognized this logical progression of fiduciary duty principles in close corporations, and held that, as a matter of law, when minority shareholders have been frozen-out of close corporations, any heightened fiduciary duties that minority shareholders owed prior to the freeze-out ceased.[234] The *Rexford Rand* decision did not recognize these principles, and imposed upon frozen-out minority shareholders a fiduciary duty solely due to their status as shareholders.[235] The *Rexford Rand* decision effectively ignored the doctrine of

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230. *Id.* at 1220.

231. Hetherington, *supra* note 53, at 935.

232. *Rexford Rand*, 58 F.3d at 1220.

233. Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 n.17 (Mass. 1975).

234. *See supra* notes 104-17 and accompanying text.

235. *See supra* notes 118-32 and accompanying text.

"unclean hands," and imposed upon frozen-out minority shareholders what effectively amounted to a life-long bar against competing with their corporation. Further, despite the *Rexford Rand* court's desire not to have additional claims in the judicial system,[236] in order for frozen-out minority shareholders to rid themselves of the fiduciary duty owed to a corporation, they are required to either sell their shares to the corporation, which is likely to result in a significant loss to minority shareholders, or seek judicial intervention in the form of a buy-out or dissolution. Neither of these options provides the optimal result to this issue, and the latter will add claims to the judicial system.

The *J Bar H* decision clearly comes to the best result when considering whether a frozen-out minority shareholder owes a continuing fiduciary duty to the corporation and the remaining shareholders. The effect of the *J Bar H* decision is that frozen-out minority shareholders are treated the same as in other terminated relationships which involve fiduciary duties. Ultimately, frozen-out minority shareholders are treated the same as minority shareholders in public corporations. Therefore, once minority shareholders' control over a corporation ceases as a result of a freeze-out, so to, as a matter of law, do the heightened fiduciary duties. This result cuts down on litigation expenses for the corporation, the shareholders, and the judicial system, and also provides a just mechanism with which to address this complex issue.

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236. *Rexford Rand*, 58 F.3d at 1221.

THE RESPONSE TO *PAYNE V. TENNESSEE*: GIVING THE VICTIM'S FAMILY A VOICE IN THE CAPITAL SENTENCING PROCESS

BRIAN J. JOHNSON*

INTRODUCTION

In *Payne v. Tennessee*,[1] the Supreme Court reversed its position in *Booth v. Maryland*,[2] by holding that the Eighth Amendment does not erect a per se bar to the introduction of victim impact evidence in a capital sentencing proceeding.[3] This controversial decision has been the subject of volumes of commentary.[4]

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* J.D. Candidate, 1997, Indiana University School of Law—Indianapolis; B.A. 1990, Indiana University—Bloomington. Thanks to Sean P. O'Brien and Clifford Ong for their assistance in preparing this Note. Thanks to my family for their support, and special thanks to my wife Elizabeth for her patience.

1. 501 U.S. 808 (1991).

2. 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

3. "We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." *Payne*, 501 U.S. at 827.

4. *See, e.g.*, Keith L. Belknap, Jr., Recent Developments, 15 HARV. J. L. & PUB. POL'Y 275 (1992); Vivian Berger, Payne *and Suffering—A Personal Reflection and Victim Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992); David R. Dow, *When Law Bows to Politics: Explaining* Payne v. Tennessee, 26 U.C. DAVIS L. REV. 157 (1992); Markus D. Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 BUFF. L. REV. 85 (1993); Carole Mansur, Payne v. Tennessee*: The Effect of Victim Harm at Capital Sentencing Trials and the Resurgence of Victim Impact Statements*, 27 NEW ENG. L. REV. 713 (1993); Suzanne Murray, *Constitutional Law—Victim Impact Evidence: Basing Sentencing Decisions on Emotion Rather than Reason*—Payne v. Tennessee, 26 SUFFOLK U. L. REV. 221 (1992); R.P. Peerenboom, *Victim Harm, Retribution and Capital Punishment: A Philosophical Critique of* Payne v. Tennessee, 10 PEPP. L. REV. 1621 (1992); Michael Vitiello, Payne v. Tennessee*: A "Stunning Ipse Dixit,"* 8 NOTRE DAME J. L. ETHICS & PUB. POL'Y 165 (1994); Ranae Bartlett, Note, Payne v. Tennessee*: Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 ARK. L. REV. 561 (1992); Michael Q. Berkley, Note, *Constitutional Law—What You Don't Know Can Kill You: The Rehnquist Court's Allowance of Unforeseeable Victim Impact Evidence in the Era of Disposable Precedent*—Payne v. Tennessee, 27 WAKE FOREST L. REV. 741 (1992); Craig E. Gilmore, Note, Payne v. Tennessee*: Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469 (1992); Elizabeth A. Meek, Note, *Victim Impact Evidence and Capital Sentencing: A Casenote on* Payne v. Tennessee, 52 LA. L. REV. 1299 (1992); Michael I. Oberlander, Note, *The* Payne *of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621 (1992); Stephen M. Sargent, Note, Payne v. Tennessee*: The Supreme Court Places its Stamp of Approval on the Use of 'Victim Impact Evidence' During Capital Sentencing Proceedings*, 1992 B.Y.U. L. REV. 841; Victor D. Vital, Casenote, Payne v. Tennessee*: The Use of Victim Impact Evidence at Capital Sentencing Trials*, 19 T. MARSHALL L. REV. 497 (1994); K. Elizabeth Whitehead, Note, *Mourning Becomes Electric:* Payne v. Tennessee*'s Allowance of Victim Impact Statements During Capital Sentencing*

Although much of the commentary has been critical,[5] it is clear, since *Payne* was decided in 1991, that the holding and the rationale underlying the decision has been adopted by an increasing number of state courts.[6] This Note focuses on the evolution of victim impact testimony in Supreme Court jurisprudence, the resulting impact on state court decisions, the legislative response, and it provides a model statute for the introduction of victim impact testimony in a manner which comports with the accused's Eighth and Fourteenth Amendment rights.[7]

I. THE SUPREME FLIP-FLOP ON THE USE OF VICTIM IMPACT DURING CAPITAL SENTENCING

The Supreme Court first addressed the use of victim impact statements in *Booth v. Maryland*.[8] In *Booth*, the Court held by a 5-4 majority that the Eighth Amendment barred consideration of victim impact evidence during a capital sentencing proceeding.[9] The victim impact statement in *Booth* involved two types of information: (1) the personal characteristics of the victims and the emotional impact of the crime on family members, and (2) the family members' opinions and characterizations of the crime and the defendant.[10] Although the Court conceded "the full range of foreseeable consequences of a defendant's actions" might be

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Proceedings, 45 ARK. L. REV. 531 (1992).

5. *See* Vitiello, Berger, Dow, Dubber, Peerenboom, Oberlander, Whitehead, Bartlett, Murray, Berkley, Vital, *supra* note 4.

6. *See* Freeman v. State, 876 P.2d 283, 289 (Okla. Crim. App. 1994) ("[E]vidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim's family is a relevant consideration of Oklahoma capital sentencing juries."). *See also Ex parte* Slaton, 680 So. 2d 909, 928 (Ala. 1996), *cert denied*, 117 S. Ct. 742 (1997); People v. Edwards, 819 P.2d 436, 467 (Cal. 1991); Windom v. State, 656 So. 2d 432, 438 (Fla.), *cert. denied*, 116 S. Ct. 571 (1995); Livingston v. State, 444 S.E.2d 748, 751 (Ga. 1994); State v. Card, 825 P.2d 1081, 1088 (Idaho 1991); People v. Howard, 588 N.E.2d 1044, 1067 (Ill. 1991); Bowling v. Commonwealth, 942 S.W.2d 293, 302 (Ky. 1997); State v. Scales, 655 So. 2d 1326, 1335 (La. 1995), *cert. denied*, 116 S. Ct. 716 (1996); Evans v. State, 637 A.2d 117, 132 (Md. 1994); State v. Fautenberry, 650 N.E.2d 878, 992-93 (Ohio), *cert. denied*, 116 S. Ct. 534 (1995); Homick v. State, 825 P.2d 600, 606 (Nev. 1992) ("The key to criminal sentencing in capital cases is the ability of the sentencer to focus upon and consider both the individual characteristics of the defendant and the nature and impact of the crime he committed. Only then can the sentencer truly weigh the evidence before it and determine a defendant's just deserts."); Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994), *cert. denied*, 116 S. Ct. 100 (1995); State v. Gentry, 888 P.2d 1105, 1136 (Wash.), *cert. denied*, 116 S. Ct. 131 (1995).

7. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The Eighth Amendment is directly applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 667 (1962).

8. 482 U.S. 496 (1987).

9. *Id.* at 509.

10. *Id.* at 502.

relevant in other criminal cases,[11] the Court decided victim impact statements were not relevant in the "unique circumstance of a capital sentencing hearing."[12] Instead, a jury was required to focus on "the defendant as a 'uniquely individual human bein[g].'"[13] The character of the victim and the effect on his family "may be wholly unrelated to the blameworthiness of a particular defendant."[14]

Justice White's dissent emphatically rejected the majority's contention that the harm caused by a defendant's actions was not relevant in a capital sentencing proceeding:

> If anything, I would think that victim impact statements are particularly appropriate evidence in capital sentencing hearings . . . by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.[15]

Echoing this sentiment, Justice Scalia wrote, "It seems to me, however—and I think, to most of mankind—that the amount of harm one causes does bear upon the extent of his 'personal responsibility.'"[16]

Two years later, in *South Carolina v. Gathers*,[17] the Court extended the holding of *Booth* to include the prohibition of prosecutorial comments relating to a victim's individual qualities. The majority concluded it was unconstitutional to allow a jury to impose a death sentence based upon the characteristics of the victim of which the defendant was not aware.[18]

The holdings of *Booth* and *Gathers* were short-lived. By 1991, the membership of the Court had substantially changed. Two members of the *Booth* majority, Justice Powell, the author of the *Booth* opinion,[19] and Justice Brennan were replaced by Justices Kennedy and Souter. *Payne* presented the now more conservative Court an opportunity to overrule *Booth* and *Gathers*.

Payne presented the following facts. Around 3 p.m. on June 27, 1987, after spending the morning and early afternoon injecting cocaine and drinking beer, Pervis Tyrone Payne entered the apartment of Charisse Christopher, who happened to live across the hall from Payne's girlfriend.[20] After Charisse rejected Payne's sexual advances, Payne became violent. A neighbor who lived directly below the apartment called police after hearing a "blood curdling scream" from

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11. *See id.* at 504.
12. *Id.*
13. *Id.* (citing Woodson v. North Carolina, 482 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, & Stevens, JJ.)).
14. *Id.*
15. *Id.* at 517 (White, J., dissenting).
16. *Id.* at 519 (Scalia, J., dissenting).
17. 490 U.S. 805 (1989).
18. *See id.* at 811.
19. *Booth*, 482 U.S. at 496.
20. *See* Payne v. Tennessee, 501 U.S. 808, 811-13 (1991).

Charisse's apartment.[21] The first officer on the scene encountered Payne leaving the building, so covered with blood he appeared to be "sweating blood."[22] Payne struck the officer with a bag, and then fled. When police arrived at Charisse's apartment, they found Charisse and her two children, Nicholas and Lacie, lying on the floor of the kitchen. Blood covered the walls and floor throughout the apartment. Despite several wounds inflicted with a butcher knife which completely penetrated his body, three-year-old Nicholas survived.[23] Charisse and her two-year-old daughter were dead. Charisse had suffered forty-two direct knife wounds and forty-two defensive wounds on her arms, caused by forty-one separate thrusts of a butcher knife. Lacie's body was near her mother's. She sustained stab wounds to the chest, abdomen, back, and head. Payne's baseball cap was snapped on her arm near her elbow.

During the sentencing phase, after Payne had presented witnesses to testify on his behalf, the State presented the testimony of Nicholas's grandmother.[24] When asked how Nicholas had been affected[25] by the murders of his mother and sister, she responded:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.[26]

In rebuttal to Payne's closing argument, the prosecutor added:

> [Payne's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.[27]

The jury recommended death on each murder count.[28]

On appeal, the Tennessee Supreme Court concluded that any violation of

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21. *See id.* at 812.

22. *See id.*

23. *See id.* at 812-13.

24. *See id.* at 814-15.

25. *Payne* provides a particularly chilling example of where victim impact evidence is indisputably relevant to the defendant's culpability. Payne murdered a mother in front of her children.

26. *Payne*, 501 U.S. at 814-15.

27. *Id.* at 816.

28. *See id.*

Payne's rights was harmless.[29] The Supreme Court granted certiorari to reconsider its holdings in *Booth* and *Gathers*.[30]

The Court, only four years after *Booth* was decided, overruled its holding in that case as it applied to the admission of evidence and argument concerning a victim's individual characteristics and the impact of the defendant's crime upon the victim's family. Chief Justice Rehnquist, writing for the majority, specifically rejected the notion that the impact of a defendant's crime was not relevant to capital sentencing.[31] The opinion began by assessing the traditional functions of criminal sentencing in contemporary society, noting that contrary to the assertions of the majority in *Booth*, an assessment of the harm caused by a defendant has always been an important consideration in determining the appropriate punishment.[32] Rehnquist also stated that although a capital defendant is required to be treated as a unique individual, this does not entitle the defendant to "consideration wholly apart from the crime which he had committed."[33]

In a concurring opinion, Justice Souter addressed the issue of the fairness of allowing a defendant to be sentenced based in part upon consideration of characteristics of the victim of which the defendant was not aware at the time he committed the crime. Murder, Souter noted, has foreseeable consequences:

> The fact the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.[34]

In his final dissenting opinion, Justice Marshall bitterly attacked the willingness of the majority to overrule precedent; "Power, not reason, is the new currency of this Court's decisionmaking."[35] Marshall believed the majority lacked the "special justification" necessary to overrule precedent.[36] It seems clear,

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29. *See id.* at 818.

30. *See* Payne v. Tennessee, 498 U.S. 1080 (1991).

31. *See Payne*, 501 U.S. at 819.

32. *See id.* at 819-22.

33. *Id.* at 822.

34. *Id.* at 838 (Souter, J., concurring).

35. *Id.* at 844 (Marshall, J., dissenting). Marshall apparently applies a "first in time" principle in his reasoning to arrive at this conclusion. When Marshall and Brennan, who were both ideologically opposed to the death penalty, comprised two-fifths of the majority in *Booth*, it was apparently, at least in Marshall's mind, a triumph of "impersonal and reasoned judgment" that carried the day. *Id.* (citing Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970)).

As Justice Scalia noted in his response to Marshall's criticism, "quite to the contrary, what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes." *Id.* at 834 (Scalia, J., concurring).

36. *Id.* at 849 (Marshall, J., dissenting). Again, Marshall's argument fails to adequately

however, given the current composition of the Court, and the wide acceptance of the rationale of *Payne* by courts[37] and legislatures,[38] the Supreme Court is unlikely to depart from its holding anytime in the near future.

II. THE IMMEDIATE EFFECT OF *PAYNE* ON SENTENCING PROCEEDINGS

Despite *Payne's* holding, it did not provide state courts or legislatures with any clear guidelines of its application to existing statutes. As Justice O'Connor stated, "[w]e do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this type of evidence, the Eighth Amendment erects no per se bar."[39] The difficulty in applying *Payne* to then existing death penalty statutes is that no explicit provisions existed providing for the presentation of victim impact evidence at capital sentencing proceedings.

There are currently thirty-eight states which impose the death penalty. As a result of *Furman v. Georgia*,[40] which effectively vacated all death penalty statutes, and *Gregg v. Georgia*,[41] in which the plurality opinion stated that discretion to impose the death penalty must be directed in such a way as to "minimize the risk of wholly arbitrary and capricious action,"[42] all thirty-eight states require the trier in a capital sentencing proceeding to weigh the existence of "aggravating" and "mitigating" circumstances.[43] Although there is some variation among states as

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explain why the Court should adhere to poorly reasoned decisions. Some decisions were so poorly reasoned when they were written, there is no answer as to why the nation is better served by adhering to a decision which once achieved a majority, rather than overruling it and minimizing its impact at the earliest opportunity. *See id.* at 842-43 (Souter, J., concurring) ("In prior cases, when this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent.").

37. *See supra* note 6.

38. *See infra* note 43.

39. *Payne*, 501 U.S. at 831 (internal quotes omitted).

40. 408 U.S. 238 (1972).

41. 428 U.S. 153 (1976).

42. *Id.* at 189 (plurality opinion).

43. Within the 38 statutes, there are variations in the type of evidence admissible. The first category of statutes include a "catch-all" phrase (hereinafter "general"), that provides for a sentencing court to hear all evidence relevant to the crime or sentence. Those 15 states with "general" statutes are: ALA. CODE § 13A-5-45 (1994); CAL. PENAL CODE § 190.3 (West 1988); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1997); KAN. STAT. ANN. § 21-4624(c) (1995); MD. CODE ANN. art. 27, § 413 (1996); MISS. CODE ANN. §§ 99-19-101, 97-3-19 (1994); NEB. REV. STAT. § 29-2521 (1995); NEV. REV. STAT. ANN. § 200.033 (Michie 1997); N.M. STAT. ANN. §§ 31-20A-1, A-5 (Michie 1994); N.C. GEN. STAT. § 15A-2000 (Supp. 1996); TENN. CODE ANN. § 39-13-204 (Supp. 1996); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1997) (Although the Texas statute can be characterized as a "general" provision, the Texas courts have tied the admissibility of victim impact evidence to its relation to the circumstances of the offense. *See supra* note 59.); VA. CODE ANN. §§ 19.2-264.4, -264.5 (Michie 1995); WASH. REV. CODE ANN. §

to which behaviors qualify as "aggravating circumstances," death penalty statutes are similar in that they delineate specific types of conduct which must be proven before a defendant can be sentenced to die. Typical aggravators for murder include the murder of a police officer or murder during the commission of a robbery or rape.[44]

10.95.060 (West 1990); WYO. STAT. ANN. § 6-2-102 (Michie Supp. 1996).

The second type of death penalty statute are those which make no general provision for the consideration of evidence not relevant to the statutorily enumerated aggravators (hereinafter "limited"). Those eleven states with "limited" statutes are: ARIZ. REV. STAT. § 13-703 (Supp. 1996-1997); DEL. CODE ANN. tit. 11, § 4209 (1995); GA. CODE ANN. § 17-10-30 (Supp. 1996); IDAHO CODE § 19-2515 (1997); 720 ILL. COMP. ANN. STAT. 5/9-1 (West Supp. 1997); IND. CODE § 35-50-2-9 (Supp. 1996); KY. REV. STAT. § 532.025 (Michie Supp. 1996); N.H. REV. STAT. ANN. § 630:5 (1996); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1997); OHIO REV. CODE ANN. § 2929.03 (Anderson 1996); S.C. CODE ANN. § 16-3-20 (Law Co-op Supp. 1996).

Another twelve states have revised their death penalty statutes since *Payne* to provide for consideration of victim impact evidence during capital sentencing proceedings. Those states are: ARK. CODE ANN. § 5-4-602 (Michie Supp. 1995); COLO. REV. STAT. ANN. § 16-11-103 (West Supp. 1996); FLA. STAT. ANN. § 921.141 (West Supp. 1997); LA. CODE CRIM. PROC. ANN. art. 905.2 (West Supp. 1997); MO. ANN. STAT. § 565.030 (Vernon Supp. 1997); MONT. CODE ANN. § 46-18-302 (1995); N.J. STAT. ANN. § 2C:11-3 (West 1995); OKLA. STAT. ANN. tit. 21, § 701.10(c) (West Supp. 1996); OR. REV. STAT. § 163.150 (Supp. 1996); PA. CONS. STAT. ANN. tit. 42, § 9711 (West Supp. 1997-1998); S.D. CODIFIED LAWS ANN. § 23A-27A-2(2) (Supp. 1997); UTAH CODE ANN. § 76-3-207 (Supp. 1996).

44. Indiana's death penalty statute is representative of the type of aggravating circumstances states typically use to determine whether a particular crime is death penalty eligible. The aggravators enumerated are:

(1)The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson;

(B) Burglary;

(C) Child molesting;

(D) Criminal deviate conduct;

(E) Kidnapping;

(F) Rape;

(G) Robbery;

(H) Carjacking;

(I) Criminal gang activity;

(J) Dealing in cocaine or a narcotic drug.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law

Unlike statutory aggravating circumstances, the Supreme Court has held that a defendant has a right to present "any relevant mitigating evidence" that he proffers in support of a sentence less than death.[45] Although the state must show the existence of a specific aggravating circumstance for a jury to sentence a defendant to death, a defendant has an unfettered right to present any type of evidence, however remotely relevant to mitigation of a death sentence, which might tend to make the imposition of the death penalty less likely.[46] This

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enforcement officer, and either:

(A) The victim was acting in the course of duty; or

(B) The murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

(A) under the custody of the department of correction;

(B) under the custody of a county sheriff;

(C) on probation after receiving a sentence for the commission of a felony; or

(D) on parole;

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The defendant burned, mutilated, or tortured the victim while the victim was alive.

(12) The victim of the murder was less than twelve (12) years of age.

(13) The victim was a victim of any of the following offenses for which the defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.

(B) Kidnapping (IC 35-42-3-2).

(C) Criminal confinement (IC 35-42-3-3).

(D) A sex crime under IC 35-42-4.

(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.

(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

(A) into an inhabited dwelling; or

(B) from a vehicle.

IND. CODE § 35-50-2-9(b) (Supp. 1996).

45. Eddings v. Oklahoma, 455 U.S. 104, 114 (1982); *see also* Skipper v. South Carolina, 476 U.S. 1, 4 (1986).

46. For example, Indiana's death penalty statute provides:

The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

imbalance, which existed before *Payne*, led Justice Scalia to comment in *Booth*:

> To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring . . . that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted.[47]

A. The Use Of Victim Impact Testimony With Existing Capital Sentencing Statutes

Although all death penalty statutes are similar in their weighing of aggravators and mitigators, the statutes differ in how victim impact evidence may be treated. These differences may be broken down into three categories: general type statues, limited statutes, and those statutes which specifically provide for victim impact evidence.[48]

1. "General" Statutes.—General statutes usually include a provision that allows a jury to hear evidence on any matter "relevant to sentence"[49] or to "the circumstances of the crime."[50] Courts have interpreted these type of statutes broadly, allowing a sentencing judge or jury to hear victim impact evidence on the theory that the harm caused by the defendant to the victim's family and the unique characteristics of the victim, are relevant to either the sentence or the circumstances of the crime.[51]

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(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) *Any other circumstances appropriate for consideration.*

IND. CODE § 35-50-2-9(c) (Supp. 1996) (emphasis added).

47. Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

48. *See supra* note 43.

49. For example, Maryland's statute allows for evidence to be presented on "Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements." MD. ANN. CODE art. 27, § 413(c)(v) (1996).

50. *See, e.g.*, TENN. CODE ANN. § 39-13-204(c) (Supp. 1996) ("[E]vidence may include, but not be limited to, the nature and circumstances of the crime. . . .").

51. *See, e.g.*, *Ex parte* Slaton, 680 So. 2d 209, 928 (Ala. 1996), *cert. denied*, 117 S. Ct. 742 (1997); People v. Edwards, 819 P.2d 436 (Cal. 1991); Evans v. State, 637 A.2d 117 (Md. 1994); Homick v. State, 825 P.2d 600, 606 (Nev. 1992); Weeks v. Commonwealth, 450 S.E.2d 379 (Va.

The willingness of state courts to accept the reasoning of *Payne* and allow victim impact evidence under the rubric of circumstances of the crime is demonstrated in *People v. Raley*:[52]

> We have recently explained that our decisions holding that victim impact evidence and argument are inappropriate in the penalty trial were largely based on *Booth v. Maryland* and *South Carolina v. Gathers*. Once those authorities no longer bound us, . . .[w]e held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim."[53]

However, the Oregon Court of Appeals in *State v. Metz*[54] rejected this reasoning. Oregon's death penalty statute included a provision describing the penalty phase that stated, "[i]n the proceeding, evidence may be presented as to any matter the court deems relevant to sentence. . . ."[55] Oregon's capital sentencing statute also included a list of four questions which must be answered in the affirmative before a defendant could be sentenced to death.[56] Consequently, the trial court allowed the victim's son and daughter to testify as to the impact of their parents' murder, reasoning that such evidence was relevant to the fourth question, "whether the defendant should receive the death sentence."[57] The appellate court disagreed, reasoning that because victim impact evidence was inadmissible when the statute was written, the legislative intent was for "a specific purpose, *i.e.*, to ensure consideration of *evidence pertaining to mitigation, with particular reference to a defendant's character, background or crime*."[58] "Any other result . . . would permit irrelevant evidence to be interjected into the penalty phase, distorting the capital jury's consideration of the statutorily prescribed questions."[59] Apparently, the Oregon legislature disagreed with this interpretation

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1994), *cert. denied*, 116 S. Ct. 100 (1995); State v. Gentry, 888 P.2d 1105 (Wash.), *cert. denied*, 116 S. Ct. 131 (1995).

52. 830 P.2d 712 (Cal. 1992).

53. *Id.* at 742. Section 190.3 provides:

"In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." CAL. PENAL CODE § 190.3 (West 1988).

54. 887 P.2d 795 (Or. Ct. App. 1994).

55. *Id.* at 800 (quoting OR. REV. STAT. § 163.150(1)(a) (1990)).

56. *See id.* A fifth question permits the trier to weight mitigating circumstances. *See* OR. REV. STAT. § 163.150 (Supp. 1996).

57. *Metz*, 887 P.2d at 800-01.

58. *Id.* at 801.

59. *Id.* at 803. *See also* McDuff v. State, 939 S.W.2d 607, 620 (Tex. Crim. App. 1997) (en banc) (admissibility of victim impact evidence linked to consequences foreseeable to defendant and to defendant's moral culpability); Smith v. State, 919 S.W.2d 96, 102 (Tex. Crim. App.) (en banc), *cert. denied*, 117 S. Ct. 587 (1996) (holding victim impact evidence is inadmissible as a matter of law to the extent it is not directly related to the circumstances of the offense or necessary for

of its intent; less than seven months after the *Metz* decision, the legislature changed the statute to specifically provide for the admissibility of victim impact evidence during a capital sentencing proceeding.[60]

2. *Limited Statutes.*—Limited death penalty statutes present a more difficult question regarding the admissibility of victim impact evidence. These statutes provide no "catch-all" phrase which allows for any relevant evidence to be considered.[61]

However, to suggest that victim impact evidence is inadmissible because a statute does not include a "catch-all" phrase is unwarranted. Most courts in states with limited statutes have accepted the use of victim impact testimony notwithstanding the absence of a statutory provision that provides for the reception of evidence relevant to any factor other than enumerated aggravators.[62] Perhaps they recognize the incongruity of allowing impact statements in sentencing for all other crimes, yet bar the consideration of such testimony when a sentencing jury must make a determination whether to mete out the ultimate punishment. There are, of course, procedural concerns when a statute does not provide guidance for the admission of such testimony. However, there are already procedural safeguards in place which, as with the admission of any other evidence, protect the defendant's rights. A trial judge has the discretion to exclude evidence whose potential prejudicial effect outweighs its probative value, and she can prevent a parade of witnesses.

Some commentators and judges have had difficulty in distinguishing between statutory aggravators and victim impact evidence;[63] however, the two concepts are not identical. *Payne* does not stand for the proposition that a defendant could be sentenced to death based solely upon the testimony of a family member of the victim that the victim was an upstanding citizen, and that his murder has had a devastating impact on his family. Victim impact is not a factor that is "weighed against" mitigating factors; it is merely relevant evidence in considering the appropriate punishment in a particular case. Aggravating circumstances are facts sufficient to elevate a crime to a death-eligible category, while victim impact

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rebuttal); State v. Carter, 888 P.2d 629, 651 (Utah), *cert. denied*, 116 S. Ct. 163 (1995).

60. OR. REV. STAT. § 163.150(1)(a) (Supp. 1996).

61. *See supra* note 43.

62. *See, e.g.*, Livingston v. State, 444 S.E.2d 748, 751 (Ga. 1994); State v. Card, 825 P.2d 1081, 1088 (Idaho 1991); State v. Howard, 588 N.E.2d 1044, 1067 (Ill. 1991) ("[W]e find persuasive the reasons that prompted the United States Supreme Court to overrule Booth . . . Accordingly, we now choose to align ourselves with the Court rule on this subject. Accordingly, we find no error in the presentation of the evidence now challenged by the defendant."); Bowling v. Commonwealth, 942 S.W.2d 293, 302 (Ky. 1997) ("A murder victim can be identified as more than a naked statistic, and statements identifying the victims as individual human beings with personalities and activities does not unduly prejudice the defendant or inflame the jury."); State v. Gumm, 653 N.E.2d 253, 263-65 (Ohio 1995), *cert. denied*, 116 S. Ct. 1275 (1996); State v. Johnson, 410 S.E.2d 547, 555 (S.C. 1991).

63. *See, e.g.*, William J. Bowers, *The Capital Jury Project: Rationale, Design, & Preview of Early Findings*, 70 IND. L.J. 1043, 1044 (1995).

evidence are facts relevant to a determination as to whether a death sentence should be imposed on a death-eligible defendant.[64] As the Oklahoma Court of Criminal Appeals explains:

> Evidence supporting an aggravating circumstance is designed to provide guidance to the jury in determining whether the defendant is eligible for the death penalty; victim impact evidence informs the jury why the victim should have lived. Even if victim impact evidence is present in every case, this does not relieve the prosecution of its burden to prove beyond a reasonable doubt the aggravating circumstance it has alleged. The two kinds of evidence are not similar: that a victim may have been a great person who will be missed by his friends and relatives does not go toward proving . . . [any] aggravating circumstance the prosecution might allege. Because the jury's discretion still is narrowly channeled by the requirement they must find at least one aggravating circumstance beyond a reasonable doubt, the death penalty does not become overbroad, and Appellant's contention this is an Eighth Amendment violation fails.[65]

The inability to draw the distinction between victim impact evidence and aggravating circumstances has led some courts to conclude that victim impact evidence is inadmissible during the sentencing phase unless it specifically relates to the existence of one of the statutorily enumerated aggravating circumstances. For example, in *Bivins v. State,*[66] the Indiana Supreme Court characterized a statement given by the victim's wife describing the impact of the murder on her and her son as a "non-statutory aggravator" which was prohibited by the Indiana Constitution.[67]

A similar result was reached in Arizona regarding the trial court's reception of victim impact evidence. In *State v. Atwood,*[68] the court concluded that "until the legislature says otherwise, . . . the trial court may not give aggravating weight

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64. *See, e.g.*, *Gumm*, 653 N.E.2d at 263 (contrasting evidence relating to the nature and circumstances of the crime with evidence relating to aggravators and mitigators).

65. Cargle v. State, 909 P.2d 806, 828 n.15 (Okla. Crim. App. 1995), *cert. denied,* 117 S. Ct. 100 (1996).

66. 642 N.E.2d 928 (Ind. 1994).

67. *Id.* at 953-57. Chief Justice Shepard stated in his concurring opinion, "I expect that the people of Indiana will be amazed to learn that Justices of their Supreme Court have declared victims constitutionally irrelevant in death penalty cases." *Id.* at 960 (Shepard, C.J., concurring). The *Bivins* court was particularly concerned with the Indiana Constitutional requirement that all penalties be proportionate to the offense. IND. CONST. art. I, § 16. The court stated that article I, section 16 of the Indiana Constitution provides more protection than the Eighth Amendment. *Bivins*, 642 N.E.2d at 955. *Compare* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (Scalia, J.) ("[T]he Eighth Amendment contains no proportionality guarantee."). *See also* Commonwealth v. Fisher, 681 A.2d 130, 146-47 (Pa. 1996) (victim impact testimony not admissible under 42 PA. CONS. STAT. § 9711 as it existed prior to being amended.).

68. 832 P.2d 593 (Ariz. 1992).

to victim impact evidence."[69] However, the court added a twist: "The trial court is free, however, to rebut evidence offered in mitigation with relevant victim impact evidence."[70]

The implication of Arizona's statement that victim impact evidence may be used in rebuttal is not clear. However, it is logical if one accepts Justice Souter's argument; victim impact evidence is admissible and relevant because it is a foreseeable consequence of the defendant's actions.[71] Thus, if a defendant, in mitigation, offers evidence of his good character, the state may use victim impact evidence to rebut this evidence.[72] As Souter noted, the victim impact is an almost inevitable consequence of the defendant's actions.[73] If a defendant is found to have been sane at the time of the crime, then he is considered able to appreciate the foreseeable consequences of his actions. When a defendant acts in a manner with callous disregard to those foreseeable consequences, it calls his or her character into question. The use of victim impact evidence in rebuttal may be a means for courts to reconcile such evidence with a statute written before *Payne* that makes no provision for its admissibility.

Once one discerns the difference between victim impact evidence and aggravators, there is no reason to exclude the admission of evidence which is relevant to the sentencing of a capital defendant. Notwithstanding a decision that victim impact testimony was admitted in error, in practice it usually makes little difference. Even though a perceived error during sentencing may be of constitutional dimensions, the trial court's decision may be upheld if it is found to be harmless beyond a reasonable doubt.[74]

III. THE LEGISLATIVE RESPONSE

As a result of decisions such as *Bivins, Atwood, Metz, Carter and Sermons*,[75]

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69. *Id.* at 673.

70. *Id.*

71. *See supra* text accompanying note 34.

72. *Cf.* State v. Johnson, 410 S.E.2d 547 (S.C. 1991). In *Johnson*, the court determined that a prosecutor's statement that "the [victim's] family could not go see him, they could only see him at the grave" was a proper response to the defendant's sister's testimony that she visited the defendant in the penitentiary for Christmas. *Id.* at 555. Clearly, the court's reasoning is correct. A defendant who seeks to evoke the jury's sympathy in such a manner can hardly complain where the prosecutor reminds the jury that the defendant made it so that the victim's family will never see their loved one again.

73. *See* Payne v. Tennessee, 501 U.S. 808, 838 (1991) (Souter, J., concurring).

74. *See Atwood*, 832 P.2d at 674; Bivins v. State, 642 N.E.2d 928, 957 (Ind. 1994); Sermons v. State, 417 S.E.2d 144, 146 (Ga. 1992); State v. Metz, 887 P.2d 795, 803 (Or. Ct. App. 1994) (The defendant was in fact sentenced to life imprisonment.); State v. Carter, 888 P.2d 629, 653 (Utah 1994), *cert. denied* 116 S. Ct. 163 (1995).

75.

In *Carter*, not only did the Utah Supreme Court hold that victim impact evidence was inadmissible under Utah's capital sentencing scheme, it specifically repudiated the rationale underlying *Payne*:

and the need to provide procedural guidelines for the admission of victim impact testimony, state legislatures have responded by enacting capital sentencing statutes that specifically provide for consideration of victim impact evidence[76] and amendments to state constitutions which essentially create a "victims' bill of rights."[77]

> [W]e find that victim impact evidence simply has no probative force in the sentencing context. Such evidence does not make it more or less likely that a defendant deserves the death penalty. In our society, individuals are of equal value and must be treated that way. We will not tempt sentencing authorities to distinguish among victims—to find in one person's death more or less deserving of retribution merely because he or she was held in higher or lower regard by family or peers. Such a scheme draws lines in our society that we think should not be drawn. The worth of a human life is inestimable, and we do not condemn those who take life more or less harshly because of the perceived value or quality of life taken.

Carter, 888 P.2d at 652.

Apparently the Utah Legislature disagreed. In 1995, less than a year after the case was decided, Utah modified its death penalty statute to specifically provide for victim impact testimony. *See* UTAH CODE ANN. § 76-3-207 (Supp. 1996). The *Carter* court made a fundamental error. Victim impact evidence may "tempt sentencing authorities to distinguish among victims," which, most agree, would generally be improper. (The exceptions to the general rule include the murder of the very young and police officers.) *See Payne*, 501 U.S. at 836 (Souter, J., concurring) ("Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation.") However, victim impact evidence may also serve legitimate purposes. Because the consequences of criminal conduct bear on the culpability of the criminal defendant, evidence of those consequences should be relevant in a sentencing proceeding. Moreover, victim impact evidence demonstrates to a jury why society punishes murder so harshly. Murder often causes unbearable heartbreak to survivors in addition to the homicide victim's loss of life.

Victim impact evidence is powerful and it presents the danger of prejudice. However, courts have long dealt with evidence which has these qualities by giving limiting instructions. Uncharged misconduct evidence possesses these same qualities. The possibility of prejudice does not justify a per se bar to that type of evidence. A per se bar is likewise not justified in capital sentencing cases. One may argue that "death is different," *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Scalia, J.), and that therefore capital defendant's need additional protection. However, the reason for rejecting victim impact evidence would be that it creates the possibility of unfair sentences for those *already convicted.* That is certainly less of an injustice than the possibility of *unfair convictions* based partially on the use of uncharged misconduct. Moreover, the state in a capital sentencing case is not required to eliminate all risk of prejudice; it only has to minimize the risk. *See* Tuilaepa v. California, 512 U.S. 967, 973 (1994).

Ultimately, we must trust juries. Trial by jury is a fundamental right and an integral part of our justice system. In capital cases, it is inevitable that powerful and wrenching evidence will be placed before ordinary citizens. Those citizens, ably instructed by the nation's trial judges, can be trusted with this type of evidence and be trusted to make the right decision.

76. *See supra* note 43.

77. Currently at least 13 of the 38 states that possess the death penalty have constitutional

A. Victim Impact Statutes

Currently, twelve states have enacted statutes which specifically allow victim impact evidence during capital sentencing proceedings, including seven in 1995 alone.[78] These statutes help address the problems of sentencing statutes which do not provide for a procedure to permit the introduction of victim impact testimony. They also send an unambiguous message to the state courts that the people of the state, want victim impact testimony to be permitted during capital sentencing proceedings. Further, because a change in the statute allowing for the introduction of victim impact testimony is a procedural change, such laws are not subject to ex post facto prohibitions[79] and can be applied to pre-existing death penalty cases.

All of the statutes which provide for the use of victim impact evidence generally follow the language of *Payne*. Most have modified the statute by simply adding a phrase which indicates that victim impact evidence may be considered, along with evidence concerning aggravating circumstances.[80] Montana's statute, enacted October 1, 1995, is an example of a statute which makes the most basic provision for the admission of victim impact testimony. It provides simply;

> In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime; the defendant's character, background, history, and mental and physical condition; *the harm caused to the victim and the victim's family as a result of the offense*; and any other facts in aggravation or mitigation of the penalty.[81]

Missouri's statute provides a trial court with a little more guidance regarding the admissibility of victim impact evidence:

> Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating

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provisions regarding the rights of victims: ARIZ. CONST. art. II, § 2.1; CONN. CONST. art. I, § 8; FLA. CONST. art. I, § 16; IND. CONST. art. I, § 13(b); MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8(a); WASH. CONST. art. I, § 35. The voters of Montana will consider a victims' rights amendment in 1998. *See* H.R. 234, Reg. Sess. (Mont. 1997).

78. *See supra* note 43.

79. *See* Collins v. Youngblood, 497 U.S. 37, 44-45 (1990); Windom v. State, 656 So. 2d 432, 439 (Fla. 1995); Mitchell v. State, 884 P.2d 1186, 1204 (Okla. Crim. App. 1994).

80. *See* MO. ANN. STAT. § 565.030 (West Supp. 1997); OKLA. STAT. ANN. tit. 21, § 701.10(c) (West Supp. 1997) ("In addition, the state may introduce evidence about the victim and about the impact of the murder on the family of the victim."); S.D. CODIFIED LAWS ANN. § 23A-27A-2 (Supp. 1997); UTAH CODE ANN. § 76-3-207(2)(a)(iii) (Supp. 1996). Utah's capital sentencing proceeding statue interestingly added that the victim must not be compared with others. This may have been in response to the *Carter* court's concerns. *See supra* note 75.

81. MONT. CODE ANN. § 46-18-302 (1995) (emphasis added).

> circumstances . . . may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victims and others. Rebuttal and surrebuttal evidence may be presented.[82]

Missouri's statute provides a trial court with guidelines for the admission of victim impact evidence by describing the type of victim impact evidence which is permissible and by making clear that the admission of such evidence is at the discretion of the court, subject to rules of evidence. Thus, a trial court is free to limit the number of witnesses or testimony if a judge feels that such evidence would be prejudicial to the defendant.

Louisiana's statute adds that "family members . . . after testifying for the state, shall be subject to cross examination."[83] This is important because a defendant must retain the right to cross-examine witnesses against him. Once the state has put the characteristics of the victim and the impact upon the family at issue, the defendant, as with any other evidence, must be allowed to rebut such evidence. This is not to suggest, however, that the defendant may introduce evidence of a victim's bad character or low worth (i.e. that the victim was a drug dealer, or an abusive father) if the state has not put the victim's personal characteristics or family impact at issue.[84] It is precisely this type of comparative worth analysis that *Payne* cautions against.[85]

New Jersey's recently enacted change to its death penalty statute[86] is unique in that it adopts the rationale of the Arizona Supreme Court in *Atwood*. The statute creates a compromise, allowing evidence of the victim's character and the impact of his death on his survivors only after the defendant has put his own character at issue.[87] Thus, a defendant may avoid the powerful impact of the description of the harm caused by his actions by not presenting evidence of his own good character. This would certainly be a difficult choice for a defendant; however, it is a choice that is no different than other difficult choices faced by a defendant during trial.[88]

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82. MO. ANN. STAT. § 565.030.

83. LA. CODE CRIM. PROC. ANN. art. 905.2 (West Supp. 1997).

84. *See* State v. Southerland, 447 S.E.2d 862, 867 (S.C. 1997). (*Payne* did not allow defendant to introduce evidence of the victim's bad character as victim impact evidence.)

85. The Supreme Court stated,

> Victim impact evidence is not offered to encourage comparative judgments of this kind-for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.

Payne, 501 U.S. at 823.

86. N.J. STAT. ANN. § 2C:11-3 (West 1995).

87. *Id.* § 2C:11-3(c)(6).

88. In *State v. Muhammad*, 678 A.2d 164, 172 (N.J. 1996), the New Jersey Supreme Court,

New Jersey's capital sentencing statute also makes a distinction between aggravating factors and victim impact evidence.[89] Only after the jury finds that the State has proven the existence of at least one statutory aggravating factor beyond a reasonable doubt is the jury permitted to consider victim and survivor impact evidence.[90]

Florida's capital sentencing statute is the best written statute in terms of describing the type of victim impact that is admissible by parroting the language of *Payne*.[91] It also draws the distinction between aggravators and victim impact evidence by specifying when victim impact is admissible:

> (7) VICTIM IMPACT EVIDENCE -- Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.[92]

Florida's statute has been upheld against challenges that it infringes on the court's right to regulate procedure[93] and that victim impact evidence is an impermissible aggravating factor.[94]

In addition to capital sentencing statutes which allow for the admission of victim impact testimony, many states have statutory provisions which designate members of a victim's family to speak on behalf of a deceased victim.[95] However, these statutes may fail to specify any limits on the number of representatives allowed for a deceased victim and are often interpreted separately from capital sentencing statutes.[96]

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in upholding the constitutionality of the statute, stated, "In the course of a criminal trial, defendants are constantly forced to make many hard choices. Whether they should testify or not is, perhaps, the most difficult choice. Yet no one would claim that the State's right to challenge the defendant's credibility or to introduce his prior record presents a constitutionally prohibited practice."

89. N.J. STAT. ANN. § 2C:11-3(c)(6) (West 1995).

90. *See id.*

91. FLA. STAT. ANN. § 921.141(7) (West 1996).

92. *Id.*

93. *See* Booker v. State, 397 So. 2d 910 (Fla. 1981); State v. Maxwell, 647 So. 2d 871 (Fla. Dist. Ct. App. 1994).

94. *See* Windom v. State, 656 So. 2d 432, 438 (Fla. 1995).

95. *See* DEL. CODE ANN. tit. 11, § 9401(5) (1995) ("Victim" includes the spouse, an adult child, parent or sibling of a deceased victim); 725 ILL. COMP. STAT. ANN. 120/3(a)(3) (West Supp. 1997) ("Crime victim" includes "a single representative who may be the spouse, parent, child or sibling of a person killed as a result of a violent crime."); MISS. CODE ANN. § 99-19-155 (1994) ("'Victim' means . . . an immediate family member of a minor victim or a homicide victim.").

96. *See* State v. Metz, 887 P.2d 795, 802 (Or. Ct. App. 1994). Oregon's omnibus victim

B. Victims' Rights Amendments

Another approach taken by state legislatures to ensure that victims have a voice during the criminal justice process is the passage of constitutional amendments ensuring that victims have certain rights.[97] These amendments are usually referred to as "victims' bill of rights." Currently at least twenty-one of the thirty-eight states that impose the death penalty have or will soon have some type of constitutional provision enumerating certain rights for the victims of crime.[98]

Victims rights amendments often begin with an introductory phrase that victims of crime have a right to be treated with fairness, respect, and dignity, or words to that effect.[99] What effect such a provision would have is unclear. Although such a provision hints that the legislature considers the rights of victims important enough to make a political statement, in terms of creating any legally cognizable rights for victims, the words are vague and open to free-wheeling interpretation.

A second phrase that may be included is that victims have a right to be present at all proceedings in which a defendant has a right to be present (except in exceptional circumstances, such as court ordered sequestration).[100] In fact, such a provision essentially creates no right which was not already recognized.

Some amendments go beyond these generalized statements and create a right for victims (or their representatives) to make a statement during sentencing.[101] For example, Washington's constitution provides that victims have the right;

> [T]o make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased,

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impact statute provided:

> At the time of sentencing, the victim or the victim's next of kin has the right to appear personally or by counsel, and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim, and the need for restitution and compensatory fine.

OR. REV. STAT. § 137.013 (1994).

The Oregon Court of Appeals concluded, "The broad language of ORS 137.013 cannot be reconciled with the more specific requirements of the aggravated murder sentencing statute. . . . Accordingly, the general authorization of ORS 137.013 must give way to the precise limitations of [Oregon's capital sentencing statute.]" *Metz*, 887 P.2d at 802.

97. *See supra* note 77.

98. *See supra* note 77.

99. *See, e.g*, UTAH CONST. art. I, § 28(1)(a) ("To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process"); ARIZ. CONST. art. II, § 2.1(A)1; IND. CONST. art. I, § 13(b); N.M. CONST. art. II, § 24(A)(1); TEX. CONST. art. I, § 30(a)(1).

100. *See* LA. REV. STAT. ANN. § 46:1844(c)(2) (West Supp. 1997).

101. ARIZ CONST. art. 2, § 2.1; MO. CONST. art.1, § 32; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; WASH. CONST. art. 1, § 35.

> incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights.[102]

Clearly, this type of amendment is precise enough to create cognizable rights for victims. But determining the extent of those rights is quite another matter. A defendant is afforded certain rights by the U.S. Constitution,[103] and those rights will trump state-created victims' rights. Similarly, a defendant is usually afforded certain rights by a state's constitution. Therefore, the interests protected by a victims' bill of rights must be reconciled with a defendant's rights. This reconciling of competing interests was precisely the dilemma faced by the Supreme Court of Washington in *State v. Gentry*.[104] In *Gentry*, the court reconsidered its previous holding in light of a subsequently passed victims rights amendment.[105]

The court first addressed the potential tension between the amendment and the due process rights of a capital defendant.[106] The court concluded that the two parts of the constitution could be harmonized:[107]

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102. WASH. CONST. art. 1, § 35.

103. For example, a defendant is guaranteed rights through the Fifth (right against self-incrimination; due process), Sixth (right to a speedy and public trial, impartial jury; to confront witnesses); Eighth (right against excessive bail, excessive fines, and cruel and unusual punishment), and Fourteenth Amendments of the U.S. Constitution which cannot be infringed by a state constitutional amendment.

104. 888 P.2d 1105 (Wash.), *cert. denied*, 116 S. Ct. 131 (1995). Prior to *Gentry*, the Supreme Court of Washington, relying on state constitutional grounds, found that victim impact evidence did not fit within any of the categories of evidence held to be admissible during the sentencing phase of a capital case. State v. Bartholomew, 683 P.2d 1079 (Wash. 1984). Often, state constitutions are construed to give criminal defendants more protection than the analogous federal rights. This construction may or may not be dictated by the plain language of the particular state constitutional provision. It may result from a desire to chart an independent course.

For example, the Indiana Supreme Court has labored mightily to give the Indiana Constitution independent significance. *See, e.g.*, State v. Owings, 622 N.E.2d 948, 950-51 (Ind. 1993). The *Owings* court, in concluding that the Indiana Constitution offers a defendant more protection than its federal counterpart, found it significant that the Indiana Constitution expressly refers to a defendant's right to "meet the witnesses face to face" whereas the Confrontation Clause does not. IND. CONST. art. I, § 13(a). Without evaluating the rule in *Owings*, one wonders how significant that difference really should be because "the Confrontation Clause guarantees the defendant a face to face meeting with witnesses before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016 (1988). A victim's rights amendment may prompt state courts to interpret provisions of state constitutions less expansively in favor of defendant's rights, particularly when the interpretation is not dictated by plain language of those provisions.

105. *Gentry*, 888 P.2d at 1137-38.

106. *See id.* at 1136.

107. The court also used the following standard in its analysis:

> [a] new constitutional provision prevails over prior provisions of the constitution if (1) it specifically repeals them, or (2) it cannot be harmonized with them. Nevertheless it

> Harmony can be achieved in one of two ways: (1) we could hold that the victim's rights amendment does not (and cannot) apply to victim impact evidence in death penalty cases (but such evidence would be admissible in other felony cases); or (2) we can hold that the categories of evidence which are admissible at a death sentencing proceeding can be expanded to include victim impact evidence.
>
> Should we adopt the former conclusion, the irony would be that in cases involving the most heinous crimes of all, the victim's representative would be prohibited from making a victim impact statement while in other murder cases, the victim's representative would be allowed to make such a statement. Furthermore, the victims' rights amendment expressly contemplates the right to use victim impact evidence "[i]n the event the victim is deceased". We conclude that the second construction more clearly gives meaning to all parts of the Washington State Constitution. Although defendants in capital cases have always had substantial due process rights, the victim also now has constitutional rights and these must be harmonized with the defendant's rights.[108]

Gentry suggests that a state court will take seriously a constitutional provision affording rights to victims of crimes provided it specifically enumerates rights which a state court can recognize, and the provision demonstrates on its face that the legislature clearly anticipated the use of victim impact evidence when the victim is murdered.

Although a clearly worded constitutional provision may help ensure that a state court allows the use of victim impact testimony, a particular state court's interpretation of its constitution, may nonetheless render the provision ineffective. A court that gives a victim impact amendment a narrower interpretation might very well reach a different conclusion than the Washington Supreme Court.[109]

> is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions.

Id. at 1138.

108. *Id.*

109. It is possible to add language to state constitutions that limit the ability of state courts to interpret specific provisions of the state constitution. For example, the Florida Constitution was amended in 1982 to read:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communications to be intercepted, and the nature of the evidence obtained. *This right shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court.* Articles or information obtained in violation of this right shall not be admissible in evidence *if such articles or information would be inadmissible under decisions of the United States Supreme Court*

IV. THE SOLUTION

The most effective way to ensure that the relatives of murder victims are given an opportunity to be heard during a capital sentencing proceeding is to combine a narrowly written statute with a constitutional amendment that specifically provides for the right of victims to be heard during sentencing. Combining a statutory provision with a constitutional amendment sends a clear and unambiguous message to state appellate courts. The people of the state, through their elected representatives and through ratification of a constitutional amendment, deem such evidence appropriate and relevant,[110] despite any personal opinions of members of the bench to the contrary. Furthermore, a narrowly written statute helps ensure that the rights of the defendant are protected, and that the sentence received is upheld upon review.

Victim impact evidence is among the most powerful evidence the state can present to a jury for the purpose of sentencing a defendant to death. One of the strongest criticisms of such evidence is its strong emotional impact. The fear is that such emotionally charged evidence will overwhelm any sense of reason during the sentencing process, such that the jury will sentence a defendant based solely upon emotion.

Such an argument carries weight. However, that victim testimony is emotional is not reason enough for its per se exclusion. The emotional reaction is a direct result of the defendant's action; it was wrought by his own hands.[111] It does not lie in the defendant's mouth to complain when emotion is a foreseeable consequence of his actions. Furthermore, juries have demonstrated an ability to consider mitigating factors even in the face of incredibly emotionally charged victim impact evidence in high-profile cases. Nonetheless, due to the strong emotional content of such evidence, limitations should be placed on its admission. As noted in *Payne*, in the event that evidence is introduced that is "so unduly

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construing the 4th Amendment to the United States Constitution.

FLA. CONST. art. I, § 12 (wording added in 1982 emphasized). *See generally* Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166, 175-182 (Bradley D. McGraw ed., 1985). Although amending a state constitution to specifically provide for the admission of victim impact testimony in capital sentencing may be effective, it might also be unnecessarily restrictive in terms of providing rights for crime victims, i.e., because of the doctrine, expressio unius est exclusio alterius.

110. "But more broadly and fundamentally still, [the Eighth Amendment] permits the People to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime." Payne v. Tennessee, 501 U.S. 808, 833 (1991) (Scalia, J., concurring). *Cf.* Bivins v. State, 642 N.E.2d 928, 957 (Ind. 1994) (linking proportionality review under Indiana Constitution to the legislature's determination of what constitutes aggravating circumstances).

111. *See* Jones v. State, 481 S.E.2d 821, 825 (Ga. 1997) ("The passion or emotion shown in this case is not the product of any arbitrary factor but the direct result of [the defendant's] own actions.").

prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."[112]

Death penalty cases are very costly, not only in terms of dollars, but in the emotional toll the lengthy trial and appeal process takes upon victims. Although a sentence of death may be expediently and emotionally gratifying to the prosecutor and the victim, that gratification must be tempered with the realities of the appeals process. If a sentence is overturned, not only is the original expense wasted, but a decision must be made whether to attempt to resentence the defendant to death and to put the victim through another emotional ordeal. Ironically, the evidence that gave the victim a voice could be used to prolong his or her agony.

An effective capital punishment system is not served by temporary victories. The goal of a statute that gives victims a voice should include the goal that the sentence withstand judicial scrutiny. The goal should not be that every capital defendant receives the death sentence, but rather that every death sentence that is imposed be upheld.

A. Victim Impact Statute

To ensure that a defendant's right to due process is maintained, a narrowly drawn statute should make clear that the normal rules of evidence that apply to criminal trials apply to the sentencing proceeding as well. Thus, the introduction of victim impact evidence should never be mandated by the statute. Despite its political appeal, such a provision would make a sentence more susceptible to being overturned on due process grounds. Despite the possibility that a judge with anti-capital punishment leanings might exclude victim impact testimony, the discretion of a judge to exclude prejudicial evidence must be maintained to ensure an appeal-proof sentence.

The statute should also provide that only one victim or representative shall be appointed to speak. From the victim's family point of view, this would certainly be the most unappealing aspect of a victim impact provision in a capital sentencing statute. Inevitably the victim's murder or victimization will have impacted many members of his or her family, and the natural temptation is to bring numerous family members to the stand to drive home the impact of the defendant's crime and to give them their day in court. However, with each witness paraded before the jury, the chances increase that an appellate court will view such evidence as cumulative and prejudicial. The most effective means of removing this temptation is by removing any discretion by the state or trial judge on this point.

Third, the statute should specify exactly what type of evidence is admissible by following the language of *Payne*. It should specify that the evidence is limited to showing the victim's uniqueness as an individual human being and the resulting loss to the community members by the victim's death. The statute should make clear that opinions about the defendant, the appropriate sentence, and the crime are not permitted. Despite the emotional appeal of a victim compelling the jury to,

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112. *Payne*, 501 U.S. at 831 (O'Connor, J., concurring).

"Please give him death," the Court has not overturned the part of *Booth* that says such evidence is inadmissible.[113]

Finally, the statute should make clear that the defendant has a right to cross-examine the witness as with any other witness. This would ensure that the defendant's right to confront witnesses is maintained, despite the potential that cross-examination might elicit testimony that is emotionally painful for the witness. Following are two proposals for a model victim impact statute

1. Model Statute.—

A. The State may appoint a single representative of the deceased victim who may be the parent, spouse, child, or sibling of the victim.
B. Once the State has provided evidence of the existence of one or more aggravating factors as described in [sec. X], the State may introduce, and subsequently argue, victim impact evidence. If the State has appointed a representative pursuant to Sec. A., such representative may testify as to the victim's unique characteristics as a human being and the resulting loss to the community's members caused by the victim's death. The admissibility of victim impact evidence is subject to the rules of evidence governing criminal trials, and the representative, after testifying, shall be subject to cross-examination.
C. If the Jury finds that the State has proven the existence of at least one aggravating factor beyond a reasonable doubt, the jury may consider the victim impact evidence presented pursuant to paragraph B in determining the appropriate sentence.
D. The representative's opinions and characterizations of the crime, the defendant, and the appropriate punishment are not admissible as victim impact evidence.
E. It is the intention of the legislature that the sentencing court be permitted to consider relevant victim impact evidence pursuant to *Payne v. Tennessee*, 501 U.S. 808 (1991).[114]

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113. *Id.* at 830 n.2. *But see* Ledbetter v. State, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997) (citations omitted):

> In *Booth*, the entire discussion dealing with family members' opinions and characterizations of the crimes was covered in two paragraphs, after an extended discussion of the other victim impact evidence, and appeared based upon the same rationale. Based on a review of these cases, *stare decisis* appears to dictate since the Eight Amendment rationale supporting the ban of the other victim impact evidence in *Booth* was overruled in *Payne*, this portion was also overruled, insofar as it had its roots in the Eight Amendment.

114. The publisher's notes for section 5-4-602 of the Arkansas Annotated Code stated, "Acts 1993, No. 1089, § 2 provided: 'It is the express intention of this act to permit the prosecution to introduce victim impact evidence as permitted by the United States Supreme Court in Payne v. Tennessee.'"

Although such a note would not be binding upon a court, it certainly provides an unambiguous statement of legislative intent.

2. *Alternative Model Statute.*—The second model statute offers a comprise solution, for states concerned about the automatic admission of victim impact testimony. Modeled after New Jersey's recently enacted capital sentencing statute, it provides that victim impact testimony is permitted when a defendant puts his own character at issue. Thus, a defendant can avoid the emotional impact by declining, as he or she may during the guilt phase, to put his or her character at issue. Once he or she does, however, the state is allowed to present impact testimony. In this way, it assures that the sentencing process will be balanced, as opposed to a one sided argument against the institution of capital punishment.

> A. The State may appoint a single representative of the deceased victim who may be the parent, spouse, child, or sibling of the victim.
> B. When a defendant puts his character at issue during a sentencing proceeding pursuant to [the statute's section regarding the presentation of mitigation evidence], the State may introduce, and subsequently argue, victim impact evidence. If the State has appointed a representative pursuant to Sec. A, such representative may testify as to the victim's unique characteristics as a human being and the resulting loss to the community's members caused by the victim's death. The admissibility of victim impact evidence is subject to the rules of evidence governing criminal trials, and the representative, after testifying, shall be subject to cross-examination.
> C. The representative's opinions and characterizations of the crime, the defendant, and the appropriate punishment are not admissible as victim impact evidence.
> D. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor pursuant to [Sec. X], the jury may consider the victim and survivor evidence presented by the State in determining the appropriate weight to give mitigating evidence presented pursuant to [Sec. X].

B. Model Constitutional Amendment

For a constitutional amendment to effectively give victims of crime a right to testify during sentencing, this right must be specifically enumerated. Furthermore, to ensure that the relatives of victims have a right to testify, the amendment must show that the drafters intended to extend the rights of victims to members of a deceased victim's family. In so doing, the amendment should make clear that the intention is not to infringe unconstitutionally upon a defendant's rights.

Model Constitutional Amendment

> Victims of crime, including the lawful representative of a minor, incompetent, or victim of homicide, are entitled to the right to be informed of criminal proceedings, and to be present, and heard when relevant, at all crucial stages of criminal proceedings, including all

sentencing and post-conviction proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

V. RECENT DECISIONS REGARDING THE ADMISSIBILITY OF VICTIM IMPACT EVIDENCE

Payne allows states to admit victim impact evidence during the capital sentencing phase, but the decision did not provide states with much guidance with regards to what types of victim impact evidence is admissible, or what procedures a trial court should adopt to ensure that the admission of victim impact evidence does not become so prejudicial as to render the sentencing phase fundamentally unfair. As a result, state courts are now beginning to grapple with these questions.

In *State v. Basile*,[115] the mother and sister of the victim presented victim impact evidence through pictures, letters, and stories, as well as a poem. In addition, the victim's sister concluded her testimony by stating, "And I Pray to God now that justice will be served."[116] The court held that the victim impact evidence was directed at the defendant's moral culpability in causing harm to the victim and her family, and was therefore properly admitted.[117] Interestingly, the *Basile* court also concluded the admissibility of victim impact evidence was not tied to "specific aggravators submitted by the State." Similarly, in *State v. Tucker*,[118] the court upheld the use photographs that showed the victim at different places on vacation, Christmas decorations in the victim's yard, the victim fishing, and the victim holding her Godchild, finding "nothing in these photographs that would have rendered Appellant's trial unfair."[119]

In *Hicks v. State*,[120] the State presented a video tape that was almost fourteen minutes in length, and included approximately 160 photographs of the victim that essentially covered the entire life of the victim.[121] During the presentation of the silent video tape, the victim's brother provided a narrative. The *Hicks* court held that the video tape "merely served as a reminder to the jury that just as Hicks, the murderer, should be considered as an individual, so, too, the State could show that Muldoon's, the victim's, death represents a unique loss . . . [W]e have no hesitation in upholding the trial court's decision admitting the tape and its narration."[122]

Hicks represents the outer limits of what has been accepted as permissible victim impact evidence, and demonstrates the danger associated with the admission of victim impact evidence in the absence of legislative or court guidance. As stated in the concurring opinion:

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115. No. 77123, 1997 WL 304337 (Mo. June 6, 1997) (en banc).
116. *Id.* at *16.
117. *See id.*
118. 478 S.E.2d 260 (S.C. 1996), *cert. denied*, 117 S. Ct. 1561 (1997).
119. *Id.* at 267.
120. 940 S.W.2d 855 (Ark. 1997).
121. *See id.* at 857 (Brown, J., concurring).
122. *Id.*

> I concur in the result because the trial judge had no guidance on this point and did exercise his discretion in curbing part of the presentation. Moreover, I cannot conclude that the presentation of the video tape rendered Hicks' trial *fundamentally unfair.* And that is the standard. I write only to emphasize that this court or the General Assembly should fashion criteria on the introduction of victim-impact evidence to assist the trial court in exercising their discretion. As matters stand today, the guidance in this area is sparse indeed.[123]

The rationale behind allowing victim impact evidence is to allow a jury "a glimpse of the life" the defendant "chose to extinguish,"[124] to create a sentencing proceeding that is balanced, that treats both the defendant and the victim as individual human beings. Allowing the state to present a video taped summary of the victim's life, accompanied by the narrative of a sobbing relative, begins to tip the balance. Although certainly effective in providing the jury with a glimpse of the victim's life, it would be disingenuous to suggest that the use of such evidence has anything other than appealing to the emotions of the jury as its primary objective. By appealing to emotion and using victim impact evidence as a tool to ensure that a defendant is sentenced to death rather as a counterweight to appeals for mercy, the state has interjected an illegitimate element into the sentencing decision, and such a proceeding will almost always be fundamentally unfair and could lead to the arbitrary imposition of the death penalty, rather than a "reasoned moral response"[125] based upon relevant evidence.

In a response to the dearth of guidelines for the admissibility of victim impact evidence, some courts have attempted to describe the purpose of victim impact evidence and delineate procedures for its admissibility. In *Cargle v. State*,[126] the defendant was convicted of two counts of first degree murder for the shooting deaths of Richard and Sharon Paisley. The State presented two victim impact witnesses, Richard's sister, Nancy Davis, and Sharon's mother, Shirley Howell.[127]

Davis testified from a prepared statement which covered twelve pages of transcript. She began with a story from Richard's life at age four, recalled his life and achievements with a series of anecdotes, and described the loss felt by those who knew Richard. Howell testified about Shirley's love of animals, as well as her love for her daughter. The testimony of both witnesses was accompanied by photographs of the victims.[128] By contrast, the defendant presented only his minister, who testified that he used to have a close relationship with defendant, "who came from loving people and who during the past few years "just kind of got apart" from his parents and the church."[129]

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123. *Id.* at 860 (Brown, J., concurring).
124. Payne v. Tennessee, 501 U.S. 808, 822 (1991).
125. *Id.* at 836 (Souter, J., concurring).
126. 909 P.2d 806 (Okla. Crim. App. 1995), *cert. denied,* 117 S. Ct. 100 (1996).
127. *Id.* at 824.
128. *See id.* at 824 nn.12-13.
129. *Id.* at 827.

The court noted that victim impact should be "restricted to those unique characteristics which define the individual who has died, the contemporaneous and prospective circumstances surrounding that death, and how those circumstances have financially, emotionally, psychologically, and physically impacted on the victim's immediate family."[130] In applying these criteria for the admissibility of victim impact evidence to the testimony presented, the court stated,

> [T]here can be no question the testimony was emotionally powerful, and from the standpoint of admissibility of victim impact evidence, much of it irrelevant. For instance, portraying Richard as a cute child at age four in no way provides insight into the contemporaneous and prospective circumstances surrounding his death; nor does it show how the circumstances surrounding his death have financially, emotionally, psychologically, and physically impacted on members of the victim's immediate family. Although Richard may have been unique in that he dressed up as Santa Claus, saved the county thousands of dollars by a personal fundraising effort, was a talented athlete and artist, and was thoughtful and considerate to his family, this goes to only one aspect of the factors enunciated in the statutory definition of victim impact statements. In fact, the entire statement by Ms. Davis goes to the emotional impact of Richard's death. There is no explicit testimony as to the financial, psychological or physical effects of the crime on his family. Taken as a whole, the probative value of Ms. Davis's statement is substantially outweighed by its prejudicial effect . . .
>
> In discussing this, we in no way hold the emotional impact of a victim's loss is irrelevant or inadmissible; we simply state that, in admitting evidence of emotional impact, especially to the exclusion of the other factors, a trial court runs a much greater risk of having its decision questioned on appeal.[131]

The court also held that photographs that were admitted were irrelevant, because the photographs "did not demonstrate any 'information about the victim," or show how their deaths are affecting or might affect survivors.[132] Nonetheless, the court found the admission of the victim impact evidence to be harmless beyond

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130. *Id.* at 828.

131. *Id.* at 829-30. *Compare* State v. Rhines, 548 N.W.2d 415, 445-46 (S.D.), *cert. denied,* 117 S. Ct. 522 (1996) (Victim's mother read a one paragraph statement describing the victim's personal characteristics and the emotional impact on the family. "This is precisely the type of evidence permitted by the Court's decision under *Payne*."); Lee v. State, 942 S.W.2d 231 (Ark. 1997) (Victim's sister testified that the victim and her mother spent most of every day together, her parents were on anti-depressants after the incident, the mother was under psychiatric care, and the victim was trying to have another child. The sister also described the painful experience of selecting her sister's wig for her funeral—not so unduly prejudicial as to render trial fundamentally unfair.).

132. *Cargle*, 909 P.2d at 830.

a reasonable doubt.[133]

Cargle is significant because the court attempted to articulate guidelines for a trial court to utilize in determining the admissibility of victim impact evidence: (1) the state should file a Notice of Intent to Produce Victim Impact Testimony, and an in-camera hearing should be held by the trial court as it relates to the statute; (2) The victim impact evidence should not be admitted until the court determines there is evidence of one or more aggravators in the record; (3) Evidence sought to be introduced should be limited to the evidence listed in the Notice to Produce Victim Impact Evidence filed before trial; (4) the trial court may utilize a question-and-answer format as a preferable method of controlling the way victim impact evidence is presented.[134]

The court also promulgated the following jury instruction:

> The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. It is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victim is an individual whose death may represent a unique loss to society and the family. This evidence is simply another method of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.
>
> As it relates to the death penalty: Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstance has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances.
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> As it relates to the other sentencing options: You may consider this victim impact evidence in determining the appropriate punishment as

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133. *Id.* at 835.

134. *See id.* at 828. *See also* Ledbetter v. State, 933 P.2d 880, 893 (Okla. Crim. App. 1997) (holding that "the person chosen to prepare a victim impact statement cannot receive aid in the composition from any outside sources, including personnel in the prosecutor's office or statements gleaned from other texts or sources.")

warranted under the law and facts in the case[135]

In *State v. Muhammad*,[136] the Supreme Court of New Jersey addressed a challenge to the capital sentencing statute, which allows the state to introduce victim impact evidence when offered to rebut a defendant's presentation of "catch-all" mitigation evidence.[137] In addition to upholding the constitutionality of the statute under the federal and New Jersey Constitutions,[138] the court held that a certain number of procedures must be followed before victim impact evidence can be admitted into evidence:

> The defendant should be notified prior to the commencement of the penalty phase that the State plans to introduce victim impact evidence if the defendant asserts the catch-all factor. The State shall also provide the defendant with the names of the victim impact witnesses that it plans to call so that defense counsel will have an opportunity to interview the witnesses prior to their testimony. The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness. Further, minors should not be permitted to present victim impact evidence except under circumstances where there are no suitable adult survivors and thus the child is the closest living relative.
>
> Before a family member is allowed to make a victim impact statement, the trial court should ordinarily conduct a . . . hearing, outside the presence of the jury, to make a preliminary determination as to the admissibility of the State's proffered victim impact evidence. The witness's testimony should be reduced to writing to enable the trial court to review the proposed statement to avoid any prejudicial content. The testimony can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests. The testimony can describe generally the impact of the victim's death on his or her immediate family. The testimony should be factual, not emotional, and should be free of inflammatory comments or references.
>
> The trial court should weigh each specific point of the proffered

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135. *Cargle*, 909 P.2d at 829-30.
136. 678 A.2d 164 (N.J. 1996).
137. *See id.* at 170-71.
138. *See id.* at 170-76.

> testimony to ensure that its probative value is not substantially outweighed by the risk of undue prejudice or misleading the jury. Determining the relevance of the proffered testimony is particularly important because of the potential for prejudice and improper influence that is inherent in the presentation of victim impact evidence. However, in making that determination, there is a strong presumption that victim impact evidence that demonstrates that the victim was a unique human being is admissible. During the preliminary hearing, the trial court should inform the victim's family that the court will not allow a witness to testify if the person is unable to control his or her emotions. That concern should be alleviated by our requirement that the witness be permitted only to read his or her previously approved testimony. Finally, the court should also take the opportunity to remind the victim's family that the court will not permit any testimony concerning the victim's family members' characterizations and opinions about the defendant, the crime, or the appropriate sentence. Finally, the trial court should inform the prosecutor that any comments about victim impact evidence in his or her summation should be strictly limited to the previously approved testimony of the witness.[139]

Muhammad also made clear the importance of constitutional amendment to ensure that victim impact testimony is admissible:

> At times we have interpreted the State Constitution to afford New Jersey citizens broader protection of certain rights than that afforded by analogous or identical provisions of the Federal Constitution. . . .
>
> . . . .
>
> In the absence of the Victim's Rights Amendment, we might have continued to hold that victim impact evidence should not be admitted during the sentencing phase of a capital case.[140]

CONCLUSION

As courts and legislatures continue to accept the use of victim impact testimony, the challenge that faces courts today should not be whether such evidence should be admitted, but how. Despite criticism, it is readily apparent that a majority of courts accept the rationale of *Payne,* and reject that of *Booth.*

To suggest that the impact of a victim's murder is not relevant to a defendant's sentencing is to marginalize the crime. The very reason we place such a high price on the intentional, unjustified taking of a human life is that murder encompasses much more than the simple extinguishing of a life. Murder does not end there. It is the rending of a person from his family, friends, and community. It deprives an individual of the opportunity to make contributions to civilization a

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139. *Id.* at 180.

140. *Id.* at 173-75.

characteristic that distinguishes the human race from all other forms of life on the planet. It is for this cost that society exacts its highest penalty.[141]

In *Booth,* Powell argued that victim impact evidence is unrelated to the blameworthiness of a particular defendant because, "defendant's rarely select their victims based on whether the murder will have an effect on anyone other that the person murdered."[142]

Rather than being an argument against impact, this argument supports its use. Any defendant charged with the degree of mental competence to be held accountable for his actions is able to appreciate that his actions will bear consequences which extend beyond the person he murders. It is this callous disregard of "whether the murder will have an affect on anyone other the person murdered" that makes the evidence of the impact of this disregard relevant.

The challenge is to construct statutes which provide victims with a voice without creating a vigilante atmosphere in the courtroom. This is best achieved with narrowly written statutes that provide minimal potential for the admission of prejudicial evidence.

As Justice Cardozo noted over sixty years ago; "But justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[143]

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141. The Supreme Court has stated, "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg v. Georgia, 238 U.S. 153, 184 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.).

142. Booth v. Maryland, 482 U.S. 496, 504 (1987).

143. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

CIPOLLONE & MYRICK: DEFLATING THE AIRBAG PREEMPTION DEFENSE

JOHN F. MCCAULEY*

INTRODUCTION

For the past eighty years, courts have consistently held that a manufacturer is liable for the negligent construction of an automobile.[1] Additionally, courts have recognized a manufacturer's duty of reasonable care in the design of its automobiles to make them safe to the user for their foreseeable use.[2] This foreseeable use encompasses travel on the streets and highways, and includes the possibility of impact or collision with other vehicles or stationary objects.[3] The duty to eliminate an unreasonable risk of foreseeable injury to vehicle occupants has evolved into the doctrine of crashworthiness.[4]

A vehicle's crashworthiness is its ability to reduce or prevent injury to occupants from impact with either objects within a vehicle, or with the vehicle's interior once an accident has occurred.[5] The distinguishing feature of crashworthiness litigation is its emphasis on injury-causing defects as opposed to accident-causing defects or the actions of vehicle drivers. Generally, in crashworthiness cases, plaintiffs contend that due to the defective design of the automobile, they received enhanced or additional injuries they would not have sustained but for the failure to provide adequate occupant protection.[6] One possibility for reducing injuries to vehicle occupants involved in an accident is the installation of airbags in the automobile.[7]

Plaintiff's have claimed that a manufacturer's failure to install an airbag renders the vehicle defective and unreasonably dangerous.[8] In response, the automobile manufacturers have often successfully argued that the National Traffic

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1. *See* Elliot v. General Motors Corp., 296 F.2d 125 (7th Cir. 1961); McPherson v. Buick Motor Co., 217 N.Y. 382 (1916).

2. *See* Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).

3. *See id.* at 498.

4. *See* Deborah J. Goldman & Martin J. Kaufman, *Recent Developments in Crashworthiness Action: Litigation Trends for the 1990's and Beyond, in* LITIGATING THE COMPLEX VEHICLES CASE 1992, at 54.

5. *See* Gregory L. Taddonio, Note, *Revisiting* Myrick v. Freightliner*: Applying the Brakes on Restrictive Preemption Analysis,* 14 J.L. & COM. 257, 258 (1995).

6. *See Larsen*, 391 F.2d at 497.

7. "The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 35 (1981).

8. *See, e.g.*, Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990).

and Motor Vehicle Safety Act of 1966[9] (hereinafter Safety Act or Act) preempts these state common law claims. Although plaintiffs have been litigating common law claims against automobile manufacturers for failure to install airbags in their vehicles for over ten years,[10] federal and state courts continue to grapple with the question of whether a plaintiff may bring such a claim or whether these claims are preempted by federal law.[11] Until recently, most courts have held that the Safety Act[12] preempts such actions relying primarily on the Act's preemption clause,[13] while others have allowed such claims to proceed holding that the Act's savings clause protects these strict liability claims.[14]

This preemption argument was the darling of the defense bar until the Supreme Court's decisions in *Cipollone v. Liggett Group, Inc.*[15] and *Freightliner Corp. v. Myrick.*[16] The teachings of these decisions provide helpful insights for navigating the preemption minefield. Although *Cipollone* and *Myrick* did not involve a failure to install an airbag claim, these cases provided important guidance for interpreting relevant portions of the Safety Act and clarified the current status of federal preemption doctrine, both of which are crucial for analysis of the airbag cases.[17]

This Note discusses and examines arguments for and against the preemption of common law airbag claims. The first two parts establish a general background to the airbag preemption issue. Part I discusses the purpose of the Safety Act and focuses on Federal Motor Vehicle Safety Standard (FMVSS) 208, which provides the requirements for occupant restraint systems in passenger automobiles.[18] Part II discusses pre-*Cipollone* federal preemption doctrine and the framework utilized by the courts to resolve preemption issues. This section includes an analysis of the different types of preemption and examples of how they are applied.

Part III examines the various applications of federal preemption doctrine in the

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9. Pub. L. No. 89-563, 80 Stat. 718 (codified in present form at 49 U.S.C. §§ 30101-30169 (1994 & Supp. I 1995)).

10. *See* Teret & Downey, *Air Bag Litigation: Promoting Passenger Safety,* TRIAL, July 1982, at 93.

11. *See, e.g.,* Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995) (holding no federal preemption of claims for failure to install airbags); Montag v. Honda Motor Co., 856 F. Supp. 574, 578 (D. Colo. 1994) (holding failure to install airbags is expressly preempted by federal law), *aff'd*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Tammen v. General Motors Corp., 857 F. Supp. 788, 791 (D. Kan. 1994) (holding failure to install airbag claim is not expressly preempted by federal law, but is impliedly preempted).

12. The current version of the Safety Act is found at 49 U.S.C. §§ 30101-30169 (1994 & Supp. I 1995), pursuant to a 1994 recodification of transportation provisions in the United States Code. The codification most often cited in the case law is 15 U.S.C. §§ 1381-1431 (1988).

13. *See* Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988).

14. *See* Tebbets v. Ford Motor Co., 665 A.2d 345 (N.H. 1995).

15. 505 U.S. 504 (1992).

16. 514 U.S. 280 (1995).

17. *See id.*

18. 49 C.F.R. § 571.208 (1996).

airbag cases. This section reviews examples of cases in this area and analyzes the various rationales utilized by courts holding on either side of the issue.

Part IV contains a review of the *Cipollone* and *Myrick* decisions and focuses on the process and rationale utilized by the Supreme Court in finding no preemption in those cases.

Finally, Part V argues that Congress did not intend to preempt common law airbag claims when it enacted the Safety Act. By examining the underlying purposes and intentions of the Safety Act in conjunction with the principles of the federal preemption doctrine outlined in *Cipollone/Myrick*, it becomes clear that the Act neither expressly nor impliedly preempts these negligent design claims.

I. THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT

In response to rapidly increasing deaths and severe injuries on the nation's highways, Congress enacted the National Traffic and Motor Vehicle Safety Act in 1966.[19] The Safety Act was passed in response to mounting highway deaths and injuries.[20] The first section of the Act entitled "Congressional declaration of purpose," states, "Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."[21] Thus, courts have consistently held that the primary objective of Congress in passing the Act was to promote safety and reduce highway deaths and injuries.[22] Congress felt that the Safety Act was the only way to ensure the accomplishment of these objectives due to the poor record of the automobile industry for adequate emphasis on safety engineering and the widely held belief that "safety doesn't sell."[23]

The Safety Act sought to increase automotive safety through the promulgation of federal motor vehicle safety standards (FMVSS). Congress envisioned that the safety standards would address two types of dangers: 1) vehicle defects which cause accidents, and 2) vehicle defects which aggravate injuries once an accident has occurred.[24] The latter problem, which is at issue here, received special attention from Congress.[25] Concerning this area of crashworthiness,[26] Congress

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19. *See* S. REP. NO. 89-1301 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709. *See also* Wood v. General Motors Corp., 865 F.2d 395, 397 (1st Cir. 1988).

20. *See* State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 477 (D.C. Cir. 1986).

21. 49 U.S.C. § 30101 (1994).

22. *Wood*, 865 F.2d at 395; Chrysler Corp. v. Tofany, 419 F.2d 499, 511 (2d Cir. 1969); Larsen v. General Motors Corp., 391 F.2d 495, 499 (8th Cir. 1968).

23. S. REP. NO. 89-1301, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2710 ("The committee cannot judge the truth of the conviction that 'safety doesn't sell,' but it is a conviction widely held in [the auto] industry which has plainly resulted in the inadequate allocation of resources to safety engineering.").

24. *See Wood*, 865 F.2d at 397.

25. *See* S. REP. NO. 89-1301 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709.

26. "Crashworthiness" involves more than mere protection from the second collision. *See, e.g.*, FMVSS 216, 49 C.F.R. § 571.216 (1996) (roof crush resistance).

focused on the devastating impact between the occupants of the vehicle and the vehicle's interior, the so-called "second collision."[27] The Senate Committee noted that the "'second collision' has been largely neglected . . ." and "[t]hat recessed dashboard instruments and the use of seat belts can mean the difference between a bruised forehead and a fractured skull."[28]

Congress implemented this plan by authorizing the Secretary of Transportation[29] to develop and issue motor vehicle safety standards to protect the public from an unreasonable risk of injury due to "the design, construction or performance of motor vehicles . . . ."[30] The Secretary of Transportation subsequently delegated the duty of promulgating safety standards to the Director of the National Highway Traffic Safety Administration (NHTSA).[31]

A. The Preemption Clause

Congress intended to give the Federal government primary responsibility for regulating the automobile industry through the Safety Act.[32] The role of the states in the motor vehicle safety regulatory scheme is articulated in the preemption clause of the Act:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority to establish or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. This clause expressly prohibits states from establishing a safety standard different from the federal standard concerning the same aspect of performance. Nothing in this section shall be construed as preventing any state from enforcing any safety standard which is identical to a Federal safety

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27. *See Wood*, 865 F.2d at 397.

28. S. REP. NO. 89-1301, at 3 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2710.

29. When passed, the regulatory authority under the Safety Act was delegated to the Secretary of Commerce. Within two months of the Safety Act's passage, Congress created the Department of Transportation and transferred the administration of the Safety Act to the new department. *See* Department of Transportation Act, Pub. L. No. 89-670, § 6(a)(6)(A), 80 Stat. 931, 938 (1966). Within the Department of Transportation, the responsibility for writing the FMVSS was delegated to the National Highway Safety Bureau. Exec. Order No. 11,357, 32 Fed. Reg. 8225 (1967). In 1970, Congress transferred the administration of the Safety Act to the National Highway Transportation Safety Administration (NHTSA). *See* Highway Safety Act of 1970, Pub. L. No. 91-605, § 202(a), 84 Stat. 1713, 1739 (1970). The current delegation is found at 49 U.S.C. § 105 (1994).

30. 49 U.S.C. § 105 (1994).

31. *See* 49 C.F.R. § 1.50(a) (1996). The current delegation to NHTSA is codified at 49 C.F.R. § 501.2(a) (1996). *See also* 49 U.S.C. § 105.

32. *See Wood*, 865 F.2d at 396.

standard.[33]

In other words, no state or political subdivision may issue an automobile safety standard that is not identical to the comparable FMVSS.[34] However, states may still establish identical regulations, and regulate on aspects of performance not specifically covered by the Safety Act.[35]

B. The Savings Clause

With respect to safety standards under state tort law, however, the preemption clause's decree of exclusive federal authority is less clear.[36] Nowhere in the preemption section are common law actions addressed, nor does the preemption section identify whether common law actions are preempted as well as state regulations. Notwithstanding the Act's preemption provision, the Act also contains a savings clause that does address common law actions directly: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[37]

Many courts have held that failure-to-install-airbag suits are preempted despite the clear language of the savings clause.[38] Perhaps the most important factor in determining the outcome of these cases concerns the courts' interpretation of these two apparently conflicting sections. The decision of whether or not no-airbag suits are preempted usually turns on the narrow or broad construction given these sections.[39]

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33. 49 U.S.C. § 30103(b) (1994). Section 30103(b) corresponds to 15 U.S.C. § 1392(d) (1988) and is often referred to as the preemption clause.

34. *See Wood*, 865 F.2d at 398.

35. *See* Chrysler Corp. v. Rhodes, 416 F.2d 319 (1st Cir. 1969).

36. *See id.*

37. 49 U.S.C. § 30103(e) (1994). Section 30103(e) corresponds with 15 U.S.C. 1397(k) (1988) and is often referred to as a savings clause.

38. *See, e.g.*, Pokorny v. Ford Motor Co., 902 F.2d 1116, 1118 (3rd Cir. 1990); Kitts v. General Motors Corp., 875 F.2d 787, 789 (10th Cir. 1989).

39. *See, e.g., Pokorny*, 902 F. 2d at 1119 (holding that preemption clause and savings clause must be read together in order to prevent rendering the savings clause a mere redundancy); *Wood*, 865 F.2d at 407 (holding that § 1397(k) should be read narrowly because Congress did not foresee lawsuits claiming design defects when it enacted § 1397(k), thus the section should not be construed to "save" such common law actions); Montag v. Honda Motor Co., 865 F. Supp. 574, 577 (D. Colo. 1994) (holding that the savings clause only preserves those nonpreempted state law tort claims, and that the savings clause must be read narrowly because Congress did not express an intent to undermine the Safety Act through the savings clause), *aff'd*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. (1996); Baird v. General Motors Corp., 654 F. Supp. 28, 30 (N.D. Ohio 1986) (holding that § 1392(d) must be construed narrowly in light of § 1397(k)'s express continuation of common law liability).

C. FMVSS 208

FMVSS 208, entitled "Occupant Crash Protection," was first adopted in 1967, and it is a lengthy regulation which "bears a complex and convoluted history."[40] Since the inception of this standard, there has been a national controversy regarding mandatory passive restraint requirements.[41] The standard specifies performance requirements for the protection of vehicle occupants in crashes.[42] The regulation's purpose is to reduce the number of deaths of vehicle occupants and the severity of injuries by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.[43]

In its original form, FMVSS 208 merely required the installation of manual lap belts in all new automobiles.[44] However, it was painfully apparent that the voluntary usage of manual seat belts was too low to achieve any significant reduction in highway deaths or occupant injuries.[45] In 1972, NHTSA amended FMVSS 208 to require the gradual mandatory phase-in of passive restraints in all cars manufactured after 1975.[46] The mandatory passive restraint controversy began with the passage of the Safety Act and has since raged for over thirty years, outlasting seven presidents, eight heads of the Department of Transportation, and more than eight Directors of the NHTSA.[47]

The first mandatory phase-in allowed manufacturers to install manual belts with an ignition interlock system which prevented a car from starting until the seat belts were engaged.[48] Public outcry against this system prompted Congress to eliminate the ignition interlock standard in 1974.[49] As amended in 1975, FMVSS 208 also granted automobile manufacturers the option of installing one of three restraint systems; passive restraints for front and lateral crashes; passive restraints for front crashes plus lap belts for side crashes and rollovers; or manual seat belts

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40. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983). For an excellent discussion of the tortured history of FMVSS 208, see Keith C. Miller, *Deflating the Airbag Preemption Controversy,* 37 EMORY L.J. 897, 901-09 (1988).

A complete history of FMVSS 208 is not necessary to understand the preemption issue. However, some background is helpful in understanding the motives and ability of the manufacturers to postpone the introduction of passive restraints for almost thirty years.

41. *See* Hernandez-Gomez v. Leonardo, 884 P.2d 183, 185 (Ariz. 1994).

42. 49 C.F.R. § 571.208 S1 (1996).

43. *Id.* § 571.208 S2.

44. *See* 32 Fed. Reg. 2415 (1967).

45. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 34 (1983).

46. *See* 37 Fed. Reg. 3911 (1972).

47. *See* Kurt B. Chadwell, Comment, *Automobile Passive Restraint Claims Post*-Cipollone: *An End to the Federal Preemption Defense*, 46 BAYLOR L. REV. 141, 145 (1992).

48. *See* Taylor v. General Motors Corp., 875 F.2d 816, 823 (11th Cir. 1989).

49. *See* U.S.C. § 1410b (1970 & Supp. V 1975) (codified in present form at 49 U.S.C. § 30124 (1994)).

alone.[50]

Late in 1975, the decision to impose mandatory passive restraints was postponed until August 1976.[51] In June 1976, The Secretary of Transportation once again delayed introduction of mandatory passive restraint systems and extended the optional alternatives indefinitely, fearing public hostility to the new systems.[52] Four months, later a new Secretary disagreed with the decision and again reversed course reimposing the mandatory requirement.[53] The new standard required the phase-in of mandatory restraints between 1982 and 1984.[54] Then again, in 1981, a new administrator rescinded the mandatory passive restraint requirements.

This decision to rescind the mandatory phase-in was challenged in the courts, and the Supreme Court held that the rescission was arbitrary and remanded the matter for further review.[55] NHTSA then reimposed the mandatory passive restraint requirement, providing for phase-in between 1986 and 1989 unless states with populations equal to two-thirds of the nation's total population passed mandatory seatbelt use laws by April 1989.[56]

Today FMVSS 208 still provides manufacturers with three options depending on the automobile's date of manufacture: (1) a passive restraint system (air bags) with seat belts;[57] (2) a combination of passive restraints, detachable shoulder harness, lap belts, and warning systems;[58] or (3) a three-point manual belt system with an audible warning device.[59] Despite the documented increase in occupant safety afforded by passive restraints, mandatory passive restraints were not required on all passenger automobiles until 1996.[60] As one court has noted, the history of the Safety Act and FMVSS 208 in government imposes standards on a politically and financially powerful industry: "The government makes bold pronouncements, considerable resistance is encountered, the government falls back, time limits come and go with liberal extensions, the party in power has their impact, yet gradually things do change."[61]

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50. *See* 49 C.F.R. § 571.208.S4.1 to S4.1.2.3.2 (1975) (current version at 49 C.F.R. § 571.208.S4.1.5.3 (1996)).

51. *See* 40 Fed. Reg. 16,217 (1975) (proposed amendment to 49 C.F.R. § 571.208 (1974) (current version at 49 C.F.R. § 571.208 (1996)).

52. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 28, 36-37 (1983) (citing Secretary Coleman's Decision of Dec. 6, 1976).

53. *See* 49 C.F.R. § 571.208.S4.1.2, S4.1.3(a) (1977) (current version at 49 C.F.R. § 571.208 (1996)).

54. *See* S. REP. NO. 95-481, at 1 (1977).

55. *Motor Vehicle Mfr's Ass'n*, 463 U.S. at 57.

56. *See* 49 C.F.R. § 571.208.S4.1.3-S4.1.5.1 (1985) (current version at 49 C.F.R. § 571.208.S4.1.3-S4.1.3.3.3 (1996)).

57. *See id.* § 571.208.S4.1.2.1 (1996).

58. *See id.* § 571.208.S4.1.2.2.

59. *See id.* § 571.208.S4.1.2.3.

60. *See id.* § 571.208(a)(1).

61. Alvarado v. Hyundai Motor Co., 908 S.W.2d 243, 246 (Tex. App. 1995, no writ).

Automobile manufacturers have been successful for over thirty years in postponing the mandatory introduction of passive restraints, having "waged the regulatory equivalent of war against the airbag."[62] Given the inability of the regulatory system to provide adequate protection for motorists, persons injured in automobile accidents have pursued their claims of defective design in the courts.[63] As this Note makes apparent, the manufacturers have fought equally hard in the courtroom to prevent the courts from making the installation of airbags an economic necessity.

II. PRE-*CIPOLLONE* FEDERAL PREEMPTION DOCTRINE

The laws of the United States are the supreme law of the land, any state law or state constitution notwithstanding.[64] Federal agency regulations may preempt state law.[65] In determining whether a federal law preempts a state's law, the "sole task is to ascertain the intent of Congress."[66] Thus, the core of federal preemption doctrine is that state law may not override or interfere with federal laws that explicitly express the will of Congress.

However, the Supreme Court has cautioned, "[i]n the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption."[67] The presumption against preemption is based on the States' longstanding interest in providing compensation to tort victims. The justification for such caution is that Congress certainly has the power to "act so unequivocally as to make clear that it intends no regulation except its own."[68]

Also, the courts have assumed that there is no preemption in order to ensure that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.[69] As one court noted, "if we are left with a doubt as to congressional purpose, we should be slow to find preemption, '[f]or the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.'"[70] Thus, preemption will not lie unless it is "the clear and manifest purpose of

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62. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 28, 49 (1983).

63. *See, e.g.*, Wood v. General Motors Corp., 865 F.2d 395, 400 (1st Cir. 1988) ("In addition to the present action, about two dozen other suits have been recently filed claiming that an automobile was defectively designed because it lacked passive [airbag] restraints.").

64. *See* U.S. CONST. art. VI, cl. 2.

65. *See* Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 713 (1985).

66. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987).

67. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663-64 (1993).

68. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947). *See also* Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996).

69. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

70. Chevron U.S.A., Inc., v. Hammond, 726 F.2d 483, 488 (9th Cir. 1984) (quoting Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943)).

Congress."[71]

The Supreme Court has held that state law is preempted by federal law in three circumstances:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . .
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . ."
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements. . . .[72]

Thus, the three types of preemption are: 1) express; 2) occupation-of-the field; and, 3) conflict. Because neither conflict nor occupation-of-the-field preemption are "explicitly stated in [a] statute's language,"[73] these two types are both forms

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71. Myrick v. Freuhauf Corp., 13 F.3d 1516, 1519 (11th Cir. 1994) (quoting *Easterwood*, 507 U.S. at 664 (citation omitted)), *aff'd sub nom.* Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); *see also Jones*, 430 U.S. at 525; *Rice*, 331 U.S. at 230.

72. English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) (quoting *Rice*, 331 U.S. at 230) (citations omitted); *see also* Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984); Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1552 (11th Cir. 1991), *aff'd,* 507 U.S. 658 (1993).

> A pre-emption question requires an examination of congressional intent. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988) (quoting *Rice,* 331 U.S. 218, 230; California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987)) (citations omitted).

73. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quoting *Jones*, 430 U.S. at 525).

of implied preemption.[74] Additionally, conflict preemption can come in two forms. State law will be preempted either when compliance with both federal and state regulations is physically impossible[75] or when the state law stands as an obstacle to the accomplishment and execution of the objectives of Congress.[76]

Express preemption occurs when Congress through explicit language in a statute declares its intention to preclude state regulation in a particular area.[77] Given the apparently unambiguous language in § 30103(b)(1), it becomes clear why some courts have held that failure to install airbag claims are expressly preempted by this clause.[78] However, despite the preemption clause, the question of whether this section expressly preempts state common law product liability claims continues today.[79]

Once a court finds that a claim is not expressly preempted, the court must determine whether the claim is impliedly preempted.[80] Conflict preemption is the most common type of preemption relied upon by the courts to find preemption of state tort airbag claims.[81] Conflict preemption exists when the state law conflicts with a federal regulatory scheme.[82] As the Supreme Court has observed, a conflict arises 1) when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; or 2) when it is impossible to comply with both state and federal law.[83] In the airbag cases, the majority of courts finding preemption have ruled that penalizing a manufacturer for failing to install an airbag would frustrate the federal scheme that gave the manufacturers a choice of options.

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74. The Supreme Court has determined that both occupation-of-the-field and conflict preemption are types of implied preemption. Public Health Trust v. Lake Aircraft, Inc., 992 F.2d 291, 294 (11th Cir. 1993) (citing Gade v. National Solid Waste Management Ass'n, 505 U.S. 88, 98 (1992) (omitting internal quotation marks)).

75. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

76. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

77. *See* Pokorny v. Ford Motor Co., 902 F.2d 1116, 1120 (3d Cir. 1990); *see also* Chadwell, *supra* note 47, at 151.

78. *See, e.g.*, Cox v. Baltimore County, 646 F. Supp. 761, 763 (D. Md. 1986).

79. *See, e.g.*, Johnson v. General Motors Corp., 889 F. Supp. 451, 457 (W.D. Okla. 1995); Montag v. Honda Motor Co., 856 F. Supp. 574, 576-77 (D. Colo. 1994), *aff'd*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Panarites v. Williams, 629 N.Y.S.2d 359, 360 (N.Y. App. Div. 1995).

80. *See* International Paper Co. v. Ouellette, 479 U.S. 481, 488 (1987) ("Given that the [Clean Water] Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts [state law].").

81. *See, e.g., Pokorny*, 902 F.2d at 1124-25; Taylor v. General Motors Corp., 875 F.2d 816, 827 (11th Cir. 1989) (finding a failure to install an airbag claim would frustrate the federal scheme by taking away the flexibility provided by a federal regulation, and prohibiting the exercise of a federally granted option).

82. *See Ouellette*, 479 U.S. at 490-92.

83. *See* Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (citations omitted)).

Occupation-of-the-field preemption occurs when Congress, by enactment of certain legislation, intends to entirely preclude state regulation in a certain field.[84] As the Supreme Court has instructed:

> Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of [the] obligations imposed by it may reveal the same purpose.[85]

III. PREEMPTION IN THE AIRBAG CASES

Over the past ten years, numerous lawsuits have been filed in both state and federal courts claiming that the failure to install an airbag rendered the vehicle unreasonably dangerous and defective. At least sixteen federal district courts have issued published opinions concerning the Safety Act and preemption of airbag claims.[86] At the federal appellate level, five circuits have considered the issue and all have found preemption of no-airbag suits.[87] However, many of the state courts

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84. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 497, 497-501 (2d ed. 1988).

85. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (citations omitted).

86. Sixteen district courts have issued eighteen opinions regarding airbag cases. *See* Johnson v. General Motors Corp., 889 F. Supp. 451 (W.D. Okla. 1995); Tammen v. General Motors Corp., 857 F. Supp. 788 (D. Kan. 1994); Montag v. Honda Motor Co., 856 F. Supp. 574 (D. Colo. 1994), *aff'd*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Pokorny v. Ford Motor Co., 714 F. Supp. 739 (E.D. Pa. 1989); Kolbeck v. General Motors Corp., 702 F. Supp. 532 (E.D. Pa. 1988); Richart v. Ford Motor Co., 681 F. Supp. 1462 (D.N.M. 1988), *rev'd sub nom.* Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989); Heftel v. General Motors Corp., Civ. A. No. 85-1713, 1988 WL 19615 (D.D.C. Feb. 23, 1988); Staggs v. Chrysler Corp., 678 F. Supp. 270 (N.D. Ga. 1987); Hughes v. Ford Motor Co., 677 F. Supp. 76 (D. Conn. 1987); Wattelet v. Toyota Motor Corp., 676 F. Supp. 1039 (D. Mont. 1987); Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987); Wood v. General Motors Corp., 673 F. Supp. 1108 (D. Mass. 1987) (Wood I), *remanded*, 865 F.2d 395 (1st Cir. 1988) (Wood II); Murphy v. Nissan Motor Corp., 650 F. Supp. 922 (E.D.N.Y. 1987); Baird v. General Motors Corp., 654 F. Supp. 28 (N.D. Ohio 1986); Cox v. Baltimore County, 646 F. Supp. 761 (D. Md. 1986); Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D. Mo. 1986); Vasquez v. Ford Motor Co., Civ. No. 86-0657, 1986 WL 18670 (D. Ariz. Nov. 4, 1986). Note, that two of these courts, the Northern District of Georgia and the Eastern District of Pennsylvania, have addressed the issue twice.

87. Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997); Montag v. Honda Motor Corp., 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990); Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989); Kitts

which have addressed the issue do not agree with the federal appellate courts.[88] A number of different concerns and interpretations exist among the courts finding preemption and those finding no preemption. A review of some of the arguments advanced for and against preemption of these state common law claims is instructive.

A. Applicability of 49 U.S.C. § 30103(b) to Airbag Claims

One source of conflict between the courts concerns the applicability of the preemption clause, § 30103(b), to common law actions. This provision of the Act does not expressly mention actions at common law nor jury verdicts in the courts.[89] The section merely mentions actions by a "state or political subdivision of a state" in setting "any safety standard not identical to the federal standard."[90] Nevertheless, some courts have held that the language of this section applies to common law actions as well as actions by state legislative/regulatory agencies.[91] Thus, a common law decision that an automobile is defective because it is not equipped with an airbag is the equivalent of a state safety standard when reduced to a judgment.[92] Just as a state or political subdivision is precluded from setting a standard not identical to its federal counterpart, a jury is similarly precluded from imposing liability based on a common law standard not identical to the federal standard. Given that FMVSS 208 grants manufacturers options other than the installation of an airbag, a jury finding that an airbag should have been installed is not identical to the federal standard.[93]

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v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988) (Wood II). All of these cases held that the plaintiffs claims were impliedly preempted. These implied preemption holdings were revisited after *Cipollone v. Liggett Group*, Inc. 505 U.S. 504 (1992). *See, e.g.*, Myrick v. Freuhauf Corp., 13 F.3d 1516, 1521-22 (11th Cir. 1994) (holding that *Cipollone* partially superseded its previous decision in *Taylor*). *But cf. Montag*, 75 F.3d at 1417 (holding that *Myrick* did not alter validity of *Kitts*); Brand v. Mazda Motor Corp., No. 95-4139-SAC, 1997 WL 109976 (D. Kan. Feb. 12, 1997) (holding that Medtronic, Inc. v. Lohr, 116 S. Ct. 2290 (1996) did not alter result in *Montag*).

88. *See, e.g.*, Monroe v. Galati, No. 1CA-SA96-0221, 1997 WL 275498 (Ariz. May 27, 1997) (en banc) Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995); Tebbets v. Ford Motor Co., 665 A.2d 345 (N.H. 1995), *cert. denied*, 116 S. Ct. 773 (1996).

89. *See, e.g.*, 29 U.S.C. § 1144(c)(1) (1994). The Employment Retirement Income Security Act of 1974, where the "state law' which is preempted includes "all laws, decisions, rules, regulation, or other state action having the effect of law."

90. 49 U.S.C. § 30103(b) (1994). There do not appear to be any court decisions holding that a jury is a "political subdivision" of a state.

91. *See, e.g.*, Cox v. Baltimore County, 646 F. Supp. 761, 763 (D. Md. 1986).

92. *See id.*; Vanover v. Ford Motor Co., 632 F. Supp. 1095, 1097 (E.D. Mo. 1986).

93. *See* Timothy Wilton, *Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 NOTRE DAME L. REV. 1, 17-20 (1986). Wilton is one of the leading academic authorities that argues passive restraint claims are preempted. His theory is that these common law claims should be preempted because they would defeat the strong policy for

At least two federal district courts, however, have determined that the preemption clause does not preempt state tort law claims in light of the savings clause.[94] According to this rationale, the preemption clause only forecloses states from implementing automobile safety regulations that differ from their federal counterparts and does not directly address common law claims. Hence, Congress made a distinction between an award of tort damages to compensate for injury and the imposition of sanctions for non-compliance with a statutory or regulatory provision by preserving common law claims.[95]

B. Occupation-of-the-Field

Courts are also in disagreement over whether Congress intended to occupy the entire field of motor vehicle safety by enacting the Safety Act in 1966. In *Staggs v. Chrysler Corp.*,[96] the district court cited *International Paper Co. v. Ouellette*[97] for the proposition that general savings clauses such as § 1397(k) will not preserve common law claims that interfere with or frustrate the purposes of an act as a whole, "where Congress has carefully drawn a comprehensive statute for dealing with a particular subject."[98] In applying this rationale to the airbag cases, the court found that careful congressional drafting of a complex regulatory scheme for federal highway safety precluded the implementation of nonidentical state standards.[99] In *Doty v. Ford Motor Co.*,[100] the District Court for the District of Columbia shared this conclusion, holding that "Congress has legislated so comprehensively in the area of motor vehicle safety through the Safety Act that it has 'left no room for the States to supplement [Federal law].'"[101]

Courts concluding that there is no preemption of airbag claims have

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uniformity of standards. However, as mentioned previously, the primary purpose of the Act is to promote safety, not uniformity of standards. *See* Harris v. Ford Motor Co., 110 F.3d 1410, 1416-17 (9th Cir. 1997) (Van Sickle, J., dissenting). Uniformity is a means to an end, not an end in itself.

94. *See* Garret v. Ford Motor Co., 684 F. Supp. 407, 411 (D. Md. 1987); Baird v. General Motors Corp., 654 F. Supp. 28, 30 (N.D. Ohio 1986).

95. *See Baird,* 654 F. Supp. at 30-31:

> The preemptive language contained in § 1392d forecloses the states from implementing their own automobile safety regulations. The statutory language does not, however, directly address the state common law, and thus does not provide for express preemption of state common law claims. . . . Accordingly, the Court finds that Congress did not expressly preempt the plaintiff's common law products liability action. . . .

96. 678 F. Supp. 274, 270 (N.D. Ga. 1987).

97. 479 U.S. 481, 493-94 (1987) (holding that where Congress carefully writes a comprehensive act to address a particular subject, the mere inclusion of a general savings clause in the legislation should not preclude a court from determining that Congress impliedly preempted that particular field).

98. *Staggs*, 678 F. Supp. at 274.

99. *See id.*

100. Civ. A. No. 85-3591, 1987 WL 31143 (D.D.C. Feb. 4, 1987).

101. *Id.* at *2 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

summarily rejected the occupation-of-the-field preemption argument. In *Garret v. Ford Motor Co.*,[102] the court held that two factors undermined the occupation-of-the-field argument. First, the *Garret* court found that the Act's express provision allowing states to enforce identical standards, and even higher standards for vehicles procured for their own use, is inconsistent with the defendant's claim that the Safety Act represented a comprehensive legislative scheme.[103] Second, courts had long recognized the ability of states to regulate areas not specifically regulated by the express text of the Act.[104] Thus the *Garret* court held that the "most reasonable way to reconcile the language of the National Motor Vehicle Traffic Safety Act is that it does not preempt plaintiff's common law claims."[105]

C. Conflict Preemption

Still another point of contention is whether common law judgments would conflict with the federal law to the extent that the state common law must be preempted. The arguments for and against conflict preemption arise out of the courts' differing interpretations of impossibility. As noted earlier, conflict preemption occurs when it is impossible for a party to comply with both state and federal regulations or the state law stands as an obstacle to the accomplishment of the objectives of the federal law.[106]

Courts favoring preemption contend that Congress intended FMVSS 208 to be both a minimum and maximum standard. The premise of this argument is that a common law judgment which imposed liability on a manufacturer because a jury found the automobile was defectively designed due to an absence of passive restraints, would amount to a requirement that manufacturers install an airbag in their automobiles.[107] The jury verdict would then become the new industry standard.[108]

D. Express Preemption

Express preemption occurs when the explicit Congressional language in a statute indicates a clear Congressional intent to preempt state action in that area. The primary argument for finding express preemption is that the preemption clause is facially unambiguous and has expressly circumscribed the area of motor vehicle safety for the federal law.[109] In *Johnson v. General Motors Corp.*,[110] the court held that Congress expressly preempted state law tort claims based on failure

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102. 684 F. Supp. 407 (D. Md. 1987).

103. *See id.* at 409.

104. *See id.* (citing Chrysler Corp. v. Rhodes, 416 F.2d 319, 323 (1st Cir. 1969)).

105. *Id.* at 412. *See also* Perry v. Mercedes Benz of N. Am., Inc., 957 F.2d 1257, 1264 (5th Cir. 1992) (finding no occupation-of-the-field preemption under the Safety Act).

106. *See* TRIBE, *supra* note 84, at 481.

107. *See, e.g.*, Staggs v. Chrysler Corp., 678 F. Supp. 270 (N.D. Ga. 1987).

108. *See id.* at 274.

109. *See* Johnson v. General Motors Corp., 889 Supp. 451, 577 (W.D. Okla. 1995).

110. 889 F. Supp. 451 (W.D. Okla. 1995).

to install airbags because those claims were applicable to the same aspect of performance as FMVSS 208, and these requirements were not identical to the federal standard.[111] The basis for this argument is that state common law damage awards are the functional equivalent of state regulatory standards and are therefore preempted by the preemption clause.[112]

However, the majority of courts, even those finding preemption (implied),[113] have held that these claims are not expressly preempted. The argument against express preemption rests primarily on the existence of the savings clause. It would be expected that given the broadly worded savings clause, which preserves all common law liability, that there would be no express preemption of these claims.

IV. *CIPOLLONE* AND *MYRICK*

Federal preemption analysis changed dramatically with the Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*[114] In addition, the Court's decision in *Freightliner Corp. v. Myrick*[115] changed the way that courts now interpret the Safety Act.

A. Cipollone v. Liggett Group, Inc.

It is clear that the weight of authority in the years following the introduction of the Safety Act, especially in the federal courts, was heavily in favor of finding that no-airbag claims were impliedly preempted. However, the Supreme Court decision in *Cipollone v. Liggett Group, Inc.* shed an entirely different light on the preemption issue. *Cipollone* did not involve airbags or automotive safety, but rather a common law damages claim against cigarette manufacturers. In *Cipollone*, the son of a woman who developed cancer after smoking for over forty years brought a claim against the cigarette manufacturers alleging: 1) breach of express warranty based on assurances that cigarettes did not cause long-term health problems; 2) fraudulent misrepresentation based on attempts through advertising to negate the effect of federally mandated warning labels; 3) design defect, for failure to use safer alternatives; 4) conspiracy to deprive smokers of information on the effects of smoking; and, 5) failure to warn, based on negligence

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111. Courts in the following cases have held that failure to install airbag claims are expressly preempted: Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997); *Johnson*, 889 F. Supp. 451; Montag v. Honda Motor Co., 856 F. Supp. 574 (D. Colo. 1994), *aff'd*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Cox v. Baltimore County, 646 F. Supp. 761, 763 (D. Md. 1986); Vanover v. Ford Motor Co., 632 F. Supp. 1095, 1096-97 (E.D. Mo. 1986); Wickstrom v. Maplewood Toyota, Inc. 416 N.W.2d 838, 840 (Minn. Ct. App. 1987); Panarites v. Williams, 629 N.Y.S.2d 359, 366 (N.Y. App. Div. 1995).

112. *See* Collazo-Santiago v. Toyota Motor Corp., 957 F. Supp. 349, 353 (D. Puerto Rico 1997) (quoting Perry v. Mercedes Benz of N. Am., Inc., 957 F.2d 1257 (5th Cir. 1992)).

113. *See, e.g.*, Pokorny v. Ford Motor Co., 902 F.2d 1116, 1125 (3d Cir. 1990).

114. 505 U.S. 504 (1992).

115. 514 U.S. 280 (1995).

in testing, selling, promoting and advertising the product.[116] The manufacturers raised the defense of preemption, arguing that the Federal Cigarette Labeling Act of 1965,[117] and the Public Health Cigarette Smoking Act of 1969[118] protected them from common law liability after 1965. The Court considered whether these claims could survive the language of the Act's preemption provisions which barred states from imposing other warning requirements relating to advertising or promoting cigarettes.[119] The question in *Cipollone* was basically the same as in the airbag cases—whether the Act's preemption clause barred state common law damages claims.

In reversing part of the Third Circuit's holding that the Labeling Acts preempted all state law claims, the Court began its analysis by reviewing some of the basic principles of preemption doctrine; the inviolability of the Supremacy Clause, the presumption that state police powers are not superseded unless that is the clear and manifest purpose of Congress,[120] and the definitions of express and implied preemption. The Court then rejected the Third Circuit's approach of construing the statute as a whole and concluded that the preemptive scope of the Labeling Acts was governed exclusively by the express preemption language of each Act because:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.[121]

Because both statutes contained express preemption clauses, the Court determined that its sole task was to identify the "domain expressly pre-empted by each of those sections."[122] There was no need to perform an implied preemption analysis.

To aid in its analysis, the Court employed several tools of statutory construction. The first was the presumption against preemption.[123] Next, the Court noted that where Congress has spoken on the issue of preemption, there is

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116. *Cipollone*, 505 U.S. at 508.

117. Pub. L. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1341 (1994)).

118. Pub. L. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331-1341 (1994)).

119. The Act required a specific and conspicuous label on all packages of cigarettes sold in the U.S. which read: "Caution: Cigarette Smoking May Be Hazardous to Your Health." *Cipollone*, 505 U.S. at 514. *See* 15 U.S.C. § 1333 (1994).

120. "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996).

121. *Cipollone*, 505 U.S. at 517 (quoting Malone v. White Motor Corp., 475 U.S. 497, 505 (1978)) (internal quotations omitted).

122. *Id.*

123. *See id.* at 518.

no need to infer congressional intent to preempt state law because of the "familiar principle of expression unius est exclusio alterius:[124] Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."[125] Applying the presumption against preemption and the aforementioned rule, the Court then determined that a "narrow reading" of the preemption provision was appropriate.[126] As a result of its analysis, the Court held that none of the petitioner's claims were preempted by the 1965 Act,[127] however, because the language of the 1969 Act was more broad, only some of the common law claims were preempted.[128] Thus, *Cipollone* dramatically altered previous preemption analyses by holding that the preemptive scope of a federal statute or regulation is limited to the express terms of the statute or regulation.

B. Myrick *I*

Following the Supreme Court's decision in *Cipollone* in 1992, many courts reevaluated their prior approaches to preemption analysis.[129] One of the courts to do this was the Eleventh Circuit Court of Appeals, which addressed the preemption question in light of the Safety Act in *Myrick v. Freuhauf Corp.*[130] In *Myrick*, two similar claims were consolidated where accidents occurred due to tractor-trailer rigs jackknifing and causing collisions on the highway. In both cases, claimants alleged that the rigs were negligently designed because they were not equipped with anti-lock brakes. The FMVSS in effect at that time gave the manufacturers "a choice of whether to install anti-lock brakes."[131] Because the manufacturers were given a choice between installing anti-lock brakes or more traditional airbrake systems, they argued that state common law actions based on

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124. The expression of one thing is the exclusion of another.

125. *Cipollone*, 505 U.S. at 517.

126. *See id.* at 518.

127. *See id.* at 518-19.

128. *See id.* at 530-31.

129. *See, e.g.*, Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 823 (1st Cir. 1992) ("[T]he High Court has made it pellucidly clear that, whenever Congress includes an express preemption clause in a statute, judges ought to limit themselves to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption."); Draper v. Chiapuzio, 9 F.3d 1391 (9th Cir. 1993); Worm v. American Cyanamid Co., 5 F.3d 744, 747 (4th Cir. 1993); Kinley Corp. v. Iowa Utils. Bd., 999 F.2d 354, 358 (8th Cir. 1993); Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1447 (10th Cir. 1993) ("[W]hen the Court recently applied the doctrine of expressio unius est exclusio alterius to preemption cases, it excluded consideration of all forms of implied preemption, including conflict preemption."); Stamps v. Collagen Corp., 984 F.2d 1416, 1420 (5th Cir. 1993) ("Applying *Cipollone*, we reject, at the outset, Collagen's contention that we may resort to the doctrine of implied preemption. . . ."); Toy Mfrs. of Am., Inc. v. Blumenthal, 986 F.2d 615, 623 (2d Cir. 1992); American Agric. Movement, Inc. v. Board of Trade, 977 F.2d 1147, 1154 (7th Cir. 1992).

130. 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom.* 514 U.S. 280 (1995).

131. *Id.* at 1519-20.

a failure to install anti-lock brakes were preempted due to an implied conflict between the federal regulation and the plaintiff's claim. In resolving this issue, the *Myrick* court held that due to express preemption language in the statute, which provided a reliable indicium of Congressional intent, there was no need to infer Congressional intent to preempt state laws.[132] In doing so, the court overruled prior Eleventh Circuit decisions interpreting the Safety Act which had found implied preemption.[133]

C. Myrick *II*

On appeal from the Eleventh Circuit's decision in *Myrick* I, the Supreme Court elaborated on its holding in *Cipollone* vis-a-vis implied preemption analysis in the face of an express preemption provision.[134] First, the Court addressed the manufacturer's express preemption argument and held that there could be no express preemption because the particular safety standard at issue, FMVSS 121, which applies to anti-lock brakes, was suspended and was not in effect for purposes of the preemption clause.[135] The Court then addressed the argument that *Cipollone* completely precluded any consideration of implied preemption, stating,

> [W]hen Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.[136]

The Court then clarified the *Cipollone* holding by stating that *Cipollone* articulated only an inference, and not a rule, that where Congress has expressly preempted a certain area in a statute, matters outside that area are not preempted.[137] Although the Court dismissed the plaintiff's argument that no implied preemption analysis was appropriate under the Safety Act because of the existence of an express preemption clause, the Court nevertheless agreed that summary judgment in favor

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132. *See id.*

133. *See, e.g.*, Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989) (In *Taylor*, the Eleventh Circuit engaged in traditional pre-*Cipollone* preemption analysis. First, the court considered and dismissed the manufacturers express preemption argument, then it performed an implied preemption analysis, finding a conflict between the effect of the state common law claim and the federal statute) (After *Cipollone*, almost all of the circuit courts held that if a preemption provision in a statute was a reliable indicium of Congressional intent, implied preemption was no longer required).

134. Freightliner Corp. v. Myrick, 514 U.S. 280, 287-89 (1995).

135. *See id.* at 289.

136. *Id.* at 288 (quoting *Cipollone*, 505 U.S. at 517) (citations and internal quotations omitted).

137. *See id.* ("At best, *Cipollone* supports an inference that an express preemption clause forecloses implied pre-emption; it does not establish a rule.").

of the defendants on the grounds of implied conflict preemption was not appropriate.

In addition, the Court held that there were two possible grounds for implied conflict preemption: 1) where it is impossible for a private party to comply with the state and federal requirements, or 2) where state law is an obstacle to the accomplishment and execution of the objectives of Congress.[138] The Court made quick work of the manufacturers preemption argument given the fact that no safety standard was in effect at the time. Thus, it was not impossible for the defendants "to comply with both federal and state law because there [was] simply no federal standard to comply with."[139] Additionally, in the absence of a promulgated standard, the Safety Act failed to address the need for anti-lock braking systems at all on tractor-trailers. Therefore, the Court had no basis for concluding that the "lawsuits frustrate 'the accomplishment and execution of the full purposes and objectives of Congress.'"[140]

V. POST-*CIPOLLONE/MYRICK* PREEMPTION ANALYSIS

Based on *Cipollone*, as clarified in *Myrick* II, the current state of preemption analysis appears clear. First, if a federal statute contains an express preemption clause, a court should determine whether that preemption clause alone provides a reliable indication of Congressional intent. In making this determination, the courts should follow the analysis in *Cipollone*: 1) begin with the presumption against preemption, 2) apply traditional canons of statutory construction, and 3) examine the other provisions of the statute in order to determine if there is any reason to go beyond the precise and narrow reading of the preemption clause itself.[141] If a court finds a reliable indication of Congressional intent in the express language and neither the application of the traditional canons of statutory construction nor examination of the other provisions of the statute suggest any reason to infer a different degree of preemption, then there is no need to go beyond the express language itself.[142]

Second, if the court determines that additional inquiry is required beyond a narrow and precise reading of the preemption clause, the court must determine whether the state law in question is in actual conflict with federal law.[143] This conflict analysis requires a determination of 1) whether it is impossible for a private party to comply with both state and federal requirements, or 2) whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[144] Although neither *Cipollone* nor *Myrick* involved airbags, applying the above principles derived from those cases resolves

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138. *See id.* at 287.
139. *See id.* at 288.
140. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
141. *See Cipollone*, 505 U.S. at 518.
142. *See* Wilson v. Pleasant, 660 N.E.2d 327, 334 (Ind. 1995).
143. *Myrick*, 514 U.S. at 287.
144. *See id.*

the airbag controversy.

A. No Express Preemption

Having established the framework in which to address the preemption argument, the first step is to determine the extent or scope of preemption intended by Congress.[145] It is clear that the preemption clause of the Safety Act, when read alone, does not provide a reliable indication of congressional intent with respect to its preemptive effect.[146] As the *Myrick* I court stated:

> We are concerned with what Congress expressly stated about pre-emption, and in the Safety Act, Congress put its statements about preemption in two statutory provisions, one of which we refer to as a preemption clause and the other one of which we call a savings clause. Our terminology notwithstanding, both of the clauses are pre-emption provisions in the material sense of the word, because both deal with what is and is not pre-empted.[147]

Thus, the two clauses taken together are the express preemption provisions of the statute. When interpreting the preemptive scope of the Safety Act, a court should read § 30103(b) in pari materia with § 30103(e) and construe the plain meaning of the language in both sections.[148] Looking first at § 30103(b), it is clear that this section requires preemption of "any safety standard" established by a state if there is a federal motor vehicle safety standard in effect covering the same aspect of motor vehicle safety.[149] The savings clause, on the other hand, provides that compliance with a federal safety standard does not exempt anyone from liability under common law.[150]

Automobile manufacturers have repeatedly argued that the savings clause does not preserve all common law liability claims, but only those that do not conflict with the standards enacted by Congress.[151] Most courts which have addressed this

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145. *See Cipollone*, 505 U.S. at 517.

146. *See Wilson*, 660 N.E.2d at 335.

147. Myrick v. Freuhauf, 15 F.3d 1516, 1526 (11th Cir. 1994), *aff'd sub nom.* 514 U.S. 280 (1995).

148. *See, e.g.*, Pokorny v. Ford Motor Co., 902 F.2d 1116, 1120 (3d Cir. 1990) (The auto manufacturers "argument that Pokorny's common law action is expressly preempted by the Safety Act and Standard 208 is unconvincing, primarily because it focuses on one provision of the Safety Act, § 1392(d), without giving adequate consideration to the Act's savings clause, § 1397(k). The question of express preemption is properly analyzed only after considering both § 1392(d) and § 1397(k).").

149. 49 U.S.C. § 30103(b) (1994).

150. *Id.* § 30103(e).

151. *See* Nelson v. Ford Motor Co., 670 N.E.2d 307, 310 (Ohio Ct. App. 1995), *appeal denied.* This argument has only been accepted by a few courts. *See, e.g.*, Boyle v. Chrysler Corp., 501 N.W.2d 865, 869 (Wis. Ct. App. 1993).

issue have refused to construe the savings clause so narrowly.[152] As one court reasoned, such a construction would render § 30103(e) a mere redundancy because § 30103(b) already provides that where a federal standard does not govern the same aspect of performance, a state standard is not preempted.[153]

Reading the two clauses in conjunction, it is clear that the plain language of § 30103(b) only prohibits states from implementing their own safety standards, and this section does not mention common law liability at all. Given the broadly-worded § 30103(e) savings clause, it would be reasonable to assume that if Congress had intended § 30103(b) to apply to common law claims as well as to state regulatory action, it would have said so. The Supreme Court has recognized that savings clauses similar to § 30103(e) preserve common law damages claims in the face of federal regulation.[154] One such act, the National Manufactured Housing Construction and Safety Act, contains language in the savings clause that is identical to the language in the Safety Act.[155] That legislation has been held to preserve common law damages claims.[156]

Perhaps the clearest enunciation of Congress' intent in 1966 regarding the relation between the two clauses came in the Eighth Circuit's ruling in *Larsen* in 1968, just two years after passage of the Safety Act:

> It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time. . . . The Act is a salutary step in this direction and not an exemption from common law liability.[157]

Thus, § 30103(b), when read in conjunction with § 30103(e), is an explicit statement which provides a reliable indication of congressional intent that a state law cause of action for failure to install an airbag claim is not preempted by the Safety Act or the standards promulgated thereunder. Therefore, given the teachings of *Myrick/Cipollone*, there is no need to perform an implied preemption analysis because the express language is a reliable indication of congressional intent.[158]

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152. *See, e.g.*, Taylor v. General Motors Corp., 865 F.2d 816, 824 (11th Cir. 1989).

153. *See id.*

154. *See* Wilson v. Pleasant, 660 N.E.2d 327, 334-35 (Ind. 1995). In *Cipollone*, the Court noted that Congress, in the savings clause in the Comprehensive Smokeless Tobacco Act of 1986, (15 U.S.C. § 4406(c) (1994)), which reads "Nothing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person.") "preserved state law damages actions based on those products." *Cipollone*, 505 U.S. at 518.

155. 42 U.S.C. § 5409(c) (1994).

156. *See, e.g.*, Shorter v. Champion Home Builders, 776 F. Supp. 333 (N.D. Ohio 1991); Mizner v. North River Homes, Inc., 913 S.W.2d 23, 26 (Mo. Ct. App. 1995).

157. Larsen v. General Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968).

158. *See, e.g.*, *Wilson*, 660 N.E.2d at 335.

However, given that the law remains so unsettled in this area, the possibility exists that a court may perform an implied preemption analysis anyway. Even if a court were to engage in an implied preemption analysis, the court would still have to come to the conclusion that the failure to install airbags is not preempted by the Safety Act.

B. No Implied Preemption

Under *Myrick*, the Supreme Court has indicated that implied conflict analysis exists where 1) it is impossible for a private party to comply with both state and federal requirements,[159] or 2) the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[160] Implied preemption occurs "when it is physically impossible for a party to comply with both state and federal law."[161] However, it is not impossible for automobile manufacturers to comply with both state and federal requirements in this instance. A manufacturer can install both seat belts and airbags, thereby achieving greater safety for vehicle occupants and fulfilling the goals of the Safety Act. In order for it to be physically impossible to comply with both state and federal requirements, the federal law would have to prohibit the installation of airbags. In that case, a state common law ruling against a manufacturer for not installing an airbag would produce a direct conflict.[162] FMVSS 208 merely permits other alternatives.

In order to determine if a state law stands as an obstacle to the full purposes and objectives of Congress, a court should examine the stated purposes and policies of the statute in general, and the statutory language at issue in particular, as elucidated by the statute's legislative history where possible.[163]

It is clear that the purpose of enacting the Safety Act was to reduce traffic accidents and deaths and injuries to persons relating from traffic accidents.[164] A finding of implied preemption would be contrary to the purpose and objectives of Congress. By authorizing federal regulation of automotive safety while preserving common law claims, Congress provided additional impetus for manufacturers to choose the safest system for the particular automobile they are manufacturing. FMVSS 208 is merely a minimum standard for motor vehicle performance.[165] It would defeat the purpose of the statute if manufacturers were not encouraged to install the safest system for their particular vehicle.

Additionally, an examination of the legislative history reveals that the drafters made a deliberate decision to preserve all common law claims. The Senate

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159. *See* Myrick v. Freuhauf, 514 U.S. 280, 287 (1995). *See also* English v. General Elec. Co., 496 U.S. 72, 79 (1990).

160. *Myrick*, 514 U.S. at 287.

161. California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (citing Florida Lime & Avocado Growers, Inc. v. Paul, 376 U.S. 132, 142-43 (1962)).

162. *See Wilson*, 660 N.E.2d at 339.

163. *See id.*

164. 49 U.S.C. § 30101 (1994).

165. *Id.* § 30111.

Committee Report commented directly on this issue. The original Senate version did not contain an express reservation of common law liability because the drafters did not believe the savings clause was required: "The federal minimum safety standards need not be interpreted as restricting state common law standards of care. Compliance with such standards would thus not necessarily shield any person form product liability at common law."[166]

Additionally, the House Committee was not satisfied that the Senate's version adequately preserved common law liability, and therefore added the savings clause. The House Committee Report stated that it "intended compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract and tort liability."[167]

The remarks of individual Congressmen are also unequivocal. The sponsor of the bill, Senator Magnusson, stated that "compliance with Federal standards does not exempt any person from common law liability."[168] Representative Dingell added: "The Act leaves intact every single common law remedy that exists against a manufacturer for the benefit of the motor vehicle purchaser."[169] Congress thus intended for the Safety Act to be a floor, not an insurance policy against common law liability.[170]

This review of the stated purposes and policies of the Safety Act, the particular language at issue and the legislative history make it abundantly clear that Congress was determined to reduce traffic accidents and deaths on the highways and to accomplish this purpose through both federal regulation and the state common law. Because compliance with FMVSS 208 is not an obstacle to the accomplishment of the purposes of Congress and it is not "physically impossible" to comply, there is no basis for finding implied preemption of airbag claims.

CONCLUSION

The National Traffic and Motor Vehicle Safety Act was enacted in 1966 in order to reduce the carnage on our nation's highways. Federal Motor Vehicle Safety Standard 208 was promulgated to ensure that automobiles provided greater protection to occupants from the "second collision" with the interior of the vehicle. For over ten years, automobile manufacturers successfully argued that the Safety Act impliedly preempted plaintiff's claims that an automobile was defectively designed because the automobile lacked an airbag.

The Supreme Court's reasoning in *Cipollone* and *Myrick* clarified federal preemption analysis and effectively eliminated the implied preemption argument under the Safety Act. A review of the statutory language and legislative history

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166. S. REP. NO. 89-1301, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720.

167. H.R. REP. NO. 89-1776, at 24 (1966).

168. 112 CONG. REC. 21,487 (1966).

169. 112 CONG. REC. 19,663 (1966).

170. *See* Harris v. Ford Motor Co., 110 F.3d 1410, 1416-18 (9th Cir. 1997) (Van Sickle, J., dissenting).

of the Act indicates that Congress intended that state common law actions would survive along with the federal regulatory scheme in order to fulfill the goals of the Act. Today, courts should find that failure to install airbag claims are not preempted by federal law and allow these claims to proceed to a jury for a determination of liability.

MEDICAID VS. THE TOBACCO INDUSTRY: A REASONABLE LEGISLATIVE SOLUTION TO A STATE'S FINANCIAL WOES?

JANA SCHRINK STRAIN*

INTRODUCTION

Providing medical care for the nation's uninsured is a major undertaking. The Medicaid program, administered by the individual states, is critical to providing medical care to people of limited financial means. Between 1989 and 1993, annual Medicaid expenditures more than doubled to an estimated $140 billion.[1] The increase has created tension between federal and state governments over how to apportion payment of the bill.[2] In order to receive federal matching funds, states have desperately looked for ways to increase their own contributions. Some states have sought voluntary donations from Medicaid providers[3] or have imposed taxes on providers.[4] These actions were curtailed by the enactment of the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991.[5] Now, in an effort to continue funding medical care, some states have sought to obtain Medicaid reimbursement from an industry whose product causes, at least arguably, significant medical expenses—tobacco. Many questions must be addressed before this reimbursement occurs. One of these questions will be whether states can look to one industry to address an economic and health crisis.

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1. *See* John K. Iglehart, *The American Health Care System—Medicaid (Health Policy Report)*, 328 NEW ENG. J. MED. 896, 896 (1993).

2. *See id.*

3. The state would solicit voluntary donations from Medicaid providers, then use these funds to repay the provider. In effect, this used the institution's funds to generate federal matching funds to pay the remaining cost of care. *See id.* at 897.

4. *See id.* at 898 (citing MEDICAID PROVIDER TAX AND DONATION ISSUES (Health Policy Alternatives, 1992)). According to a 1992 survey by the National Conference of State Legislatures, 33 of 42 responding states indicated that they use some provider assessment or donation to "pull down" additional federal funds with no net increase in their own contributions. *Id.*

5. Pub. L. No. 102-234, 105 Stat. 1793 (1991) (codified as amended at 42 U.S.C.A. §§ 1396a-1396b, 1396r-4 (West Supp. 1997)). These amendments were enacted in response to concerns that increased taxes and donations from providers would contribute to spiraling Medicaid costs. *See* H.R. REP. No. 102-310, at 29-31 (dissenting views), *in* 1991 U.S.C.C.A.N. 1413, 1438-40 (decrying use of fiscal scams to shift funding burden from states to federal government). Under these amendments, federal matching funds were disallowed for any funds obtained from providers and "allowed matching funds for only those broad-based taxes that did not hold taxpayers harmless for the cost of the tax." Katharine R. Levit et al., *National Health Expenditures, 1993,* HEALTH CARE FIN. REV., Fall 1994, at 247, 266.

This Note will focus on that question. It will begin with an overview of the Medicaid program and a review of the economic problems which have led states to pursue reimbursement, followed by a brief look at the tobacco industry's lengthy history of litigation and avoidance of liability for tobacco-related harms. This Note will then address the implications of the Equal Protection Clause on state actions which single out one industry to solve a broad economic problem borne by the state's taxpayers. This analysis will include a review of the history of the Equal Protection Clause, its modern applications, and its applicability to the states' course of action.

I. THE MEDICAID "PROBLEM"

A. The Medicaid Program

Congress established the Medicaid program in 1965.[6] A welfare program under the Social Security Act, Medicaid is jointly administered by the states and the federal government.[7] Because Medicaid uses a welfare model, there is marked disparity between the services provided in different states. In addition, the characterization of Medicaid as "welfare" leads to considerable political vulnerability[8] as entitlement programs are evaluated and cut in order to balance the federal budget.

Medicaid is funded by state and federal general revenues and eligibility is based on a means test. The federal matching funds are based on annual congressional appropriations and state contribution is usually from general revenues.[9] The effective match rate for federal funds contribution in 1993 was an estimated 64.5%.[10] In order to receive federal matching funds, states must adhere to minimum eligibility and service requirements set by the federal government.[11] State governments have flexibility in designing the scope of their Medicaid programs, as long as the total scope is within the federal constraints.[12]

Although the federal government specifies some groups which must be covered by Medicaid, others are covered at the option of the state government. Individuals who receive cash assistance under state and federal Aid to Families

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6. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C.A. §§ 1396-1396s (West 1992 & Supp. 1997)).

7. *See* Eleanor D. Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855, 856 (1990).

8. *See id.* at 857.

9. *See id.* at 860 (citing HEALTH CARE FINANCING ADMIN., PROGRAM STATISTICS: ANALYSIS OF MEDICAID PROGRAM CHARACTERISTICS, 1986, at 119 (Table 67) (1987)).

10. This figure is based on financial settlement sheets used by Health Care Financing Administration to compute matches, excluding Medicaid buy-ins and disproportionate share payments offset by taxes and donations in the same hospital. *See* Levit et al., *supra* note 5, at 267 (Table 8).

11. *See* 42 U.S.C.A. § 1396a (West Supp. 1997).

12. *See id.*

with Dependent Children (AFDC) or the federal Supplemental Security Income (SSI) program for the aged, blind, and disabled are "categorically needy" and coverage is mandatory.[13]

Individuals who have income or resources too high to qualify for SSI or AFDC may also be mandatorily eligible for Medicaid. Coverage has been extended to include pregnant women and children under the age of six whose family income is below 133% of federal poverty level.[14] Further, states may elect to cover groups for whom coverage is not required by federal law as long as states do not impose eligibility requirements that are more restrictive than for AFDC or SSI.[15] One group for whom states provide optional coverage is the "medically needy." These are families of dependent children or persons who are aged, blind, or disabled, but who are not eligible for cash assistance because they have income or assets which exceed state eligibility levels for cash assistance.[16]

B. Medicaid Expenditures

The Medicaid program accounted for about 14.4% of personal health care spending in the United States in 1993.[17] In 1991, costs per beneficiary on Medicaid were $8524 for the elderly; $7789 for the disabled; and $1086 for adults in low-income families. Medicaid payments totaled $77 billion[18] in 1991 and $140 billion in 1993.[19] Medicaid's total expenditures grew at an annual compound rate of 21.6% between 1988 and 1992.[20] Federal and state Medicaid spending increased at nearly twice the average annual rate of overall spending between 1990 and 1993.[21] Federal spending on health programs in 1993 accounted for 18.6% of all federal expenditures.[22] In the same year, state and local government spending on health care was 12.4% of total spending, which was 0.5% lower than for 1990.[23] This change reflected increased federal responsibility under Medicare and Medicaid programs which were broadened through clarification of

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13. *See* 42 C.F.R. §§ 435.400 to .541 (1996).

14. *See* Levit et al., *supra* note 5, at 278.

15. *See* 42 C.F.R. § 435.401.

16. *See* 42 U.S.C.A. § 1396a(a)(10)(C) (West Supp. 1997); 42 C.F.R. §§ 435.300 to .350, .400 (1996).

17. *See* Levit et al., *supra* note 5, at 265.

18. *See* Iglehart, *supra* note 1, at 896 (citing data from the Health Care Financing Administration).

19. *See id.*

20. *See id.* at 897 (Table 1).

21. Medicaid spending increased at 16%, while overall spending increased at 8.3%. Levit et al., *supra* note 5, at 249.

22. *See id.* at 263.

23. *See id.* The 1990 figure for state expenditures was a "prerecession high." However, since 1960, government health expenditures as a percentage of total government expenditures has risen from 7.8% to a "reduced" 12.4% in 1993. *Id.*

payment rules[24] and widening of eligibility requirements.[25] These increases are related to several causes, including mandated program eligibility, court decisions requiring higher reimbursement rates, "and States' use of disproportionate share payments to hospitals with a large proportion of low-income patients."[26] Funding for Medicaid absorbed 21% of federal grants to the states in 1985 and is projected to absorb 55% by 1997.[27] The fallout is that other programs using federal grants (cash welfare programs, school-lunch and nutrition programs, subsidized housing, highways, education, etc.) will suffer as limited available funds are being applied to Medicaid.[28]

II. THE TOBACCO "PROBLEM"

A. The Economics of Tobacco

Tobacco is big business and plays a considerable economic role in the United States, as well as other countries in the world. Over seven million metric tons of tobacco are produced throughout the world each year.[29] The United States produced 722,000 metric tons of tobacco in 1990, a 10% share of the total world production.[30] Approximately 500,000 people were employed in tobacco growing in the United States in 1987, in full-time, part-time, seasonal, or annual capacities.[31] Tobacco is the most profitable crop in the United States, largely due to factors such as price supports, guaranteed prices, or other incentives.[32] In July 1995, Congress rejected an amendment that would eliminate millions of dollars in tobacco subsidies through seven government programs.[33]

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24. For example, the Boren Amendment required a "reasonable and adequate payment for services rendered." *See* Levit et al., *supra* note 5, at 265.

25. Federal requirements for eligibility were changed to increase coverage for mothers and children, and certain low-income, aged, and disabled Medicare enrollees. *See* 42 U.S.C.A. § 1396a (West Supp. 1997). Additionally, federal requirements for increased payments to disproportionate share hospitals serving disproportionate shares of Medicaid or other low-income populations were introduced. *See* 42 U.S.C. § 1320b-5 (1994).

26. *See* Levit et al., *supra* note 5, at 265.

27. *See* Iglehart, *supra* note 1, at 897 (citing Victor J. Miller, *Medicaid Financing Mechanisms and Federal Limits: a State Perspective*, at i, *in* MEDICAID PROVIDER TAX AND DONATION ISSUES (Health Policy Alternatives 1992)).

28. *See id.*

29. *See* JORDAN GOODMAN, TOBACCO IN HISTORY: THE CULTURES OF DEPENDENCE 7 (Table 1.1) (1993).

30. *See id.* at 8 (Table 1.2).

31. *See id.* at 9 (Table 1.3).

32. *See id.* at 9-10.

33. *See Proposal for Eliminating Subsidies Hits Dead End in Congress*, 9 Litig. Rep.: Tobacco No. 7 (Mealey's) 27 (Aug. 3, 1995). The amendment to the Agriculture Appropriations Act was presented by Rep. Dick Durbin (D-Ill.), co-chairman of the bipartisan Congressional Task Force on Tobacco and Health, during House Appropriations Committee mark-up of the U.S.

In 1988, Philip Morris, a leading multinational tobacco company, was the fourteenth largest company of any kind in the world. Its overall sales from tobacco and non-tobacco activities exceed $39 billion, with an output of 555 billion cigarettes.[34] Americans consumed 2910 cigarettes annually per adult between 1985 and 1988.[35] Tobacco companies spent $1.9 billion on cigarette advertising in 1983.[36] All of these figures combine to create a direct economic impact through growing, processing, selling, and consuming tobacco products.

In addition to this direct impact, the U.S. Treasury, as well as many state treasuries, benefit from tobacco through tax revenues. In 1951, the federal tax was eight cents per pack of twenty cigarettes; in 1995, it was twenty-four cents.[37] With adjustment for inflation, the eight-cent tax is the equivalent of approximately forty cents today—so the federal tax on cigarettes has actually decreased.[38] Tobacco taxes added $9.4 billion to federal coffers in 1986.[39] Adding state and local taxes, the total tax on cigarettes accounts for 30% of the average retail price.[40] All of these factors combine to make tobacco a powerful industry and a sensitive political issue.

B. Tobacco-Related Medical Expenses

It is estimated that each year tobacco use kills 430,000 American smokers.[41] An additional 53,000 non-smokers die each year from diseases caused by secondhand cigarette smoke.[42] The dangers of exposure to environmental tobacco smoke (ETS, passive or "secondhand" smoke) have been reported since 1950, but have garnered considerable public attention only since 1980.[43] Secondhand smoke causes an increased risk of lower respiratory tract infections in children up to eighteen months old, resulting in 150,000 to 300,000 cases annually of infections such as bronchitis or pneumonia.[44] This exposure also causes upper respiratory infections, middle ear effusion, and slight reduction in lung function for children. Asthmatic children exposed to tobacco smoke have increased risk of attacks and

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Department of Agriculture's 1996 appropriation bill. *See id.*

34. *See* GOODMAN, *supra* note 29, at 11 (table 1.5).

35. *See id.* at 12 (Table 1.6).

36. *See id.* at 114 (Table 5.4).

37. *See* I.R.C. § 5701(b), (d) (1994); Carl E. Bartecchi et al., *The Global Tobacco Epidemic*, SCI. AM., May 1995, 44, 48.

38. *See* Bartecchi et al., *supra* note 37, at 48.

39. *See id.*

40. *See id.* This amount is substantially lower than those in many other industrial nations.

41. *See* STANTON A. GLANTZ, TOBACCO: BIOLOGY & POLITICS 6 (1992). This figure includes approximately 174,000 who died from heart disease, 26,000 from stroke, 143,000 from cancer, 83,000 from lung disease, and 4000 from other diseases. *See id.*

42. *See id.* at 7.

43. *See id.* at 23.

44. *See* Lawrence P. Warshaw, *The Duty to Warn of ETS's Dangers: What if Thomas Cipollone Gets Cancer?*, 16 J. PROD. & TOXICS LIAB. 55, 55 (1994).

greater severity of attacks; further, tobacco smoke may induce asthma in previously asymptomatic children.[45] Secondhand smoke also causes heart disease, lung and other cancers, and non-fatal effects, such as sore throat and headaches.[46]

One difficulty in using these figures is that the effects of smoking today may not appear for many years, making causation difficult to prove. For example, cancer deaths related to cigarette-smoking reflect a twenty- to thirty-year latency period between the initiation of smoking on a regular basis and the onset of disease.[47] A similar effect may be expected for other smoking-related illnesses. There is a further problem in showing the annual cost of medical care for smoking-related illness. The U.S. Office of Technology Assessment has determined that estimates of the economic effects of the health consequences of smoking must generally consist of three elements: (1) an identification of any increased incidence of smoking-related illness in smokers or former-smokers and an attribution of that increase to smoking; (2) an application of these figures to estimates of the direct health care costs of caring for persons with smoking-related illness; and (3) an estimate of the indirect costs of smoking-related illness, which may be measured by valuing excess mortality, as well as time lost due to morbidity, as economic values.[48]

Although various studies have been conducted in an effort to determine the economic costs of smoking-related health care, they have not included nonmedical components of direct costs, such as patient transportation or environmental accommodations which must be made to accommodate a chronically ill person.[49] Further, measurements of indirect costs have generally focused on "lost productivity." This measure has been criticized for placing a high value on certain groups of people, especially younger adults, men, and better-educated individuals whose projected incomes are higher than other groups.[50] In addition, these estimates do not attempt to quantify intangible items, such as "pain and suffering," losses experienced by smokers' relatives, or premature death.[51]

One estimate of the annual total cost of medical care for smokers is between $12 billion and $35 billion or between $214 and $870 per smoker each year.[52] The lifetime costs for smokers over the age of twenty-five are estimated to be $6239 per smoker.[53] If Medicaid pays 14.4% of all United States health care

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45. *See id.*

46. *See* GLANTZ, *supra* note 41, at 26-27.

47. *See* U.S. SURGEON GEN. & PAN AM. HEALTH ORG., U.S. DEP'T OF HEALTH & HUMAN SERVS., SMOKING AND HEALTH IN THE AMERICAS 105 (1992) [hereinafter 1992 REPORT].

48. *See id.*

49. *See id.* at 107.

50. *See id.* at 107-08.

51. *See id.* at 108.

52. *See id.* at 110 (citing U.S. Office of Technology Assessment study (1985)) (These figures represent prevalence-based estimates of economic costs as shown in direct medical care expenses, workdays lost, and lost future productivity due to annual death rates.).

53. *See id.*

expenditures,[54] then Medicaid expenses would range from $1.73 billion to $5.04 billion per year or $1029.44 per smoker over the age of twenty-five per year.[55]

The "per pack" health care cost of smoking is quoted as $2.17, however this cost fails to distinguish between internal costs (borne by smokers) and external costs (borne by non-smokers).[56] In the United States, these health care costs are paid by a variety of sources, with direct payments by consumers comprising 24%; private insurance payments totaling 33%; federal government expenditures equaling 30% (mostly through Medicare and Medicaid); and state and local governments paying for 11% (mostly through contributions to Medicaid).[57] These figures reflect the extent to which tobacco use by a relatively small proportion of the population affects the entire population through deflecting medical costs to both public and private health care plans.

C. Genesis of Tobacco Litigation

Tobacco-related litigation is nothing new in the United States. In 1954, the legal experts believed that the first lawsuit against a tobacco company for the death of a smoker by lung cancer would begin a series of suits that would eventually overwhelm the tobacco companies.[58] The pundits were wrong, however, and that case became the first in a run of over 300 legal victories for the tobacco companies.[59] Smoker-plaintiffs were unsuccessful because the tobacco companies were able to challenge the causal link between tobacco and a given plaintiff's illness, assert that smokers assumed the risks inherent in the use of tobacco, and create an expensive litigation process for generally under-funded legal challengers.[60] This litigation usually consisted of consumers (or their survivors) suing tobacco companies for the damages caused by smoking cigarettes. Most of these cases were resolved in favor of the tobacco companies on the basis of contributory negligence or assumption of the risk by the tobacco consumer. Legal analysts identified two rationales for the success of the tobacco industry: "the industry's history of hiring the best lawyers and keeping them busy, and its ability to dictate the standards by which it is judged."[61] In 1994, it was reported that the

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54. *See supra* text accompanying note 17.

55. These figures are an extrapolation of the various available statistics. These Medicaid cost figures for smoking-related illness are not presumed to be exact.

56. *See* 1992 REPORT, *supra* note 47, at 113.

57. *See id.*

58. *See* Mark Curriden, *The Heat Is On—Facing High-Powered Plaintiff's Lawyers and Damaging Revelations, the Once Invincible Tobacco Industry may no Longer be able to snuff out its opponents*, A.B.A. J., Sept. 1994, at 58, 58.

59. *See id.*

60. *See* Note, *Recent Legislation—Torts—Products Liability—Florida Enacts Market Share Liability for Smoking-Related Medicaid Expenditures—Medicaid Third-Party Liability Act of 1994*, 108 HARV. L. REV. 525, 525 (1994) [hereinafter Note, *Recent Legislation*].

61. Curriden, *supra* note 58, at 59.

tobacco industry spent more than $600 million on legal fees.[62]

The tobacco industry has enjoyed a long history of de facto immunity in products liability cases, largely as a result of its significant economic position.[63] Through forty years of plaintiff claims, the industry never paid any amount of compensation to individuals with smoking-related illnesses.[64] Suits were brought under a variety of legal theories, including fraud, negligence, and breach of warranty; however, none of these plaintiffs could overcome tobacco companies' claims that the harmful effects of smoking were unforeseeable.[65] Although attacking from several directions, they were still unsuccessful.[66]

In 1964, the Surgeon General's Advisory Committee's Report[67] describing the effects of smoking was released. One year after its publication, Congress enacted the Federal Cigarette Labeling and Advertising Act[68] which mandated a uniform system of warning on tobacco product labels. The Labeling Act was determined to "preempt most if not all of the claims being asserted."[69] The number of claims filed after the passage of the Act dropped dramatically. In the late 1970s and 1980s, however, theories of strict liability came to the forefront and led to a renewed interest in suing tobacco companies.[70] Again, many plaintiffs tried, but were unsuccessful.[71] In a landmark case,[72] the Supreme Court held that the

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62. *See id.* (citing the advocacy group, Public Citizen).

63. *See supra* at Part II.A.

64. *See* Heather Cooper, *Tobacco Litigation: A Comparative Analysis of the United States and European Community Approaches to Combating the Hazards Associated with Tobacco Products*, 16 BROOK. J. INT'L. L. 275, 279 (1990).

65. *See id.* at 281.

66. *See, e.g.*, Ross v. Philip Morris, Inc. 328 F.2d 3 (8th Cir. 1964) (breach of implied warranty of fitness); R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963) (product liability); Pritchard v. Liggett & Meyers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (warranty of fitness for use and negligent failure to warn), *aff'd on reh'g*, 350 F.2d 479 (3d Cir. 1965); Fine v. Philip Morris, Inc., 239 F. Supp. 361 (S.D.N.Y. 1964) (breach of warranty, negligence, and misrepresentation).

67. U.S. DEPT. OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

68. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341 (1994)).

69. Paul G. Crist & John M. Majoras, *The "New" Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551, 552 (1987) (citing 15 U.S.C. §§ 1331-1341).

70. *See* Sven Krogius, Comment: Dewey v. R.J. Reynolds Tobacco Co.: *A Welcome Exercise of Restraint in Applying Preemption Doctrine to State Tort Actions,* 57 BROOK. L. REV. 209, 218 (1991).

71. *See, e.g.*, Kotler v. American Tobacco Co., 926 F.2d 1217 (1st Cir. 1990) (Labeling Act preempted post-1965 claims for intentional misrepresentation); Baker v. Liggett Group, Inc., 132 F.R.D. 123 (D. Mass. 1990) (only post-1965 claims based on inadequacy of health warnings in promotion and advertising were preempted by Labeling Act); Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987) (claims for defective design based on failure to adequately warn were

Labeling Act did not preempt state law tort actions, but superseded only positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertising. Despite this, success has eluded plaintiffs. Difficulty proving causation, along with the expanding common knowledge of the risks associated with cigarettes, has made it extremely difficult for plaintiffs to succeed.[73]

Because traditional tort actions have not been successful for individual claimants, new avenues have recently been explored. A class action lawsuit[74] filed in New Orleans sought to overcome one of the greatest detriments to plaintiffs' claims in the past: insufficient firepower in the courtroom. This class action would have involved a large group of plaintiffs' attorneys from some of the nation's leading firms, with each firm contributing funds for the initial expenses of the suit. The class was decertified on a finding that this action did not provide a superior method of adjudication because knowledge regarding the "addiction as injury" theory did not establish a common issue. Further, there was no showing of negative value or judicial savings in pursuing this class action. In addition, the variations in state tort law would make it cumbersome and ineffective to try all of these actions as one claim.[75]

Plaintiffs may have been given a "major breakthrough" from a group of documents recently "leaked" by a former Brown & Williamson Tobacco Co. employee. These documents allegedly show that the industry was struggling, as early as the 1960s, with how to deal with its own research which showed that smoking caused lung cancer and heart problems.[76] The records further show that a policy was developed which required that "all scientific reports must be prepared in anticipation of litigation" and that "direct lawyer involvement is needed, pertaining to smoking and health . . . through every aspect of the activity."[77] These documents have given litigants a new direction: lawsuits focusing on deceit and fraud.[78] Brown and Williamson is fighting to keep the documents out of evidence and to enjoin the former employee's testimony.[79]

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preempted by Labeling Act and advertising did not constitute a warranty of future performance or representation of health or safety).

72. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). The Court held that the Federal Cigarette Labeling and Advertising Act did not preempt state law damages actions; the amended Act preempted claims based on failure to warn; and the amended Act did not preempt claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

73. *See* Crist & Majoras, *supra* note 69, at 552.

74. Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

75. Castano v. American Tobacco Co., 94 F.3d 734, 740-42 (5th Cir. 1996).

76. *See* Curriden, *supra* note 58, at 61.

77. *Id.*

78. *See id.*

79. The documents in question were allegedly stolen by a former paralegal, Merrell Williams, and deposited in a public library. B&W is arguing that the documents are privileged and therefore not discoverable by states suing for Medicaid reimbursement. *See Attorney, B&W Battle*

In August, 1995, a jury in Jacksonville, Florida, gave the tobacco industry a historic second defeat[80] via a $750,000 plaintiff's verdict against Brown & Williamson Tobacco on behalf of a sixty-six-year-old smoker and his wife.[81] Brown & Williamson sought a judgment notwithstanding the verdict or a new trial based on 109 reasons, including that it did not breach any duty to warn, that the cigarettes were not defectively designed, and that the plaintiff failed to show proximate cause for his claims of negligence and strict liability.[82] This was the first case in which the "stolen" Brown & Williamson documents were admitted into evidence. Brown & Williamson has also argued that it did not have an opportunity to prepare a defense to allegations based on these documents.[83] Brown & Williamson also argues that these documents were admitted in violation of the attorney-client privilege.[84] Brown & Williamson's motions for judgment notwithstanding the verdict or for a new trial were both denied, with no stated reason.[85] The Florida District Court of Appeals has denied certiorari.

In addition, litigation over secondhand smoke has entered the picture. In 1994, the first wrongful death action was filed against a tobacco company based on a claim that the non-smoker had died from exposure to secondhand smoke.[86] A recent worker's compensation case awarded a large settlement to the survivor of a Veterans Administration hospital nurse who died of lung cancer caused by secondhand smoke.[87] It is too soon to tell whether these are an indication of a change in the litigation record of the tobacco companies, however, until the early 1980s the asbestos industry had a similar long winning streak in products liability

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Over Issuance of Subpoena to Mississippi Lawyer, 9 Litig. Rep.: Tobacco No. 16 (Mealey's) 19 (Dec. 21, 1995).

80. The first defeat came in 1988 with a $400,000 verdict for the plaintiff in Cipollone v. Liggett Group, Inc., 693 F. Supp. 208 (D.N.J. 1988); *aff'd in part, rev'd in part*, 843 F.2d 531 (3d Cir. 1990). However, the Third Circuit overturned the award of damages.

81. *See* Carter v. Brown & Williamson Tobacco Corp., No. 95-934-CA CV-B (Fla., Duval Cir. Ct. Dec. 5, 1996), *cert. denied*, 680 So. 2d 546 (Fla. Dist. Ct. App. 1996).

82. *See B & W Seeks JNOV, New Trial in* Carter *Suit in Florida*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 4 (Sept. 6, 1996).

83. *See B & W Appeals* Carter *Verdict, Will Challenge Testimony, Privileged Documents Use*, 10 Litig. Rep.: Tobacco No. 6 (Mealey's) 28 (Dec. 19, 1996).

84. *See id.*

85. *See B & W Denied New Trial, JNOV in* Carter *Case, Appeal Expected to Follow*, 10 Litig. Rep.: Tobacco No. 15 (Mealey's) 8 (Dec. 5, 1996).

86. Vera Titunik, *Big Suits: South*, AM. LAW., July/Aug. 1994, at 110, 110. The suit sought $650 million total damages from 13 tobacco companies. *Id.*

87. The U.S. Labor Department ruled that the death of the former nurse was at least partly due to secondhand smoke she had breathed while working in a psychiatric unit at the hospital for 17 years. Her husband was awarded $21,500 a year. The ruling is not admissible in court, but may have an effect on employers concerned about their liability for future claims if they do not ban smoking in the workplace. *Husband Wins Claim in Secondhand Smoke Death*, N.Y. TIMES, Dec. 17, 1995, § 1, at 1.

before the tide turned and the industry became nearly defunct.[88]

III. THE TOBACCO "SOLUTION"

Several states have entered the tobacco litigation foray to recoup money spent on health care.[89] As of December 1996, nineteen states had filed suit against the industry:[90] Florida,[91] Mississippi,[92] West Virginia,[93] Minnesota,[94] Massachusetts,[95]

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88. *See* Bob Williams, *Cigarette Makers Being Sued in Courts Around the World*, THE RECORD, Apr. 23, 1995, at A29.

89. "The Centers for Disease Control recently estimated that smoking-related illnesses cost the United States $50 billion in medical-care expenditures in 1993, about 40% of which was paid for by Medicare or Medicaid." Note, *Recent Legislation, supra* note 60, at 525 n.5.

90. *See* Mark Hansen, *Capitol Offensives*, A.B.A. J., Jan. 1997, at 50, 54.

91. Florida v. American Tobacco Co., CL 95-1466 AH (Fla., Palm Beach Cir. Ct.) (this case has not been decided). The circuit court judge has ruled that the Brown and Williamson documents are part of the public domain and denied the motion to seal them, but has not ruled on admissibility. Claudia MacLachlan, *Recent Tobacco Rulings Give Both Sides the Jitters*, NAT'L L.J., June 12, 1995, at B1 (col. 2). On June 27, 1996, the Florida Supreme Court held that amendments to state law which allow Florida to sue the tobacco industry for Medicaid reimbursement are constitutional. Agency for Health Care Admin. v. Associated Indus., Inc., 678 So. 2d 1239, 1257 (Fla. 1996), *cert. denied*, 117 S. Ct. 1245 (1997).

92. *See* MacLachlan, *supra* note 91. The first to sue the tobacco companies in May 1994, Mississippi's unjust enrichment claim survived a motion to dismiss. *Id.* In February 1996, the governor of Mississippi filed suit against the state's attorney general in an effort to have the state's Medicaid reimbursement claim dropped, claiming the governor had the exclusive authority to bring such a claim and seeking declaratory judgment and other relief. *In re* Fordice, 691 So. 2d 429 (Miss. 1997). The court concluded it lacked subject matter jurisdiction and dismissed the action. *Id.* The Mississippi Supreme Court has denied the tobacco industry's request for a writ of prohibition and/or a writ of mandamus. *In re* Corr-Williams Tobacco Co., 691 So. 2d 424, 427 (Miss. 1997) (en banc). In support of its request, the tobacco industry argued that the attorney general lacked authority to pursue the state's Medicaid claims because that power had been given to the governor and the Medicaid division. *Id.* at 425.

93. McGraw v. American Tobacco Co., No. 94-C-1707 (W. Va., Kanawha Cir. Ct.). The bulk of this case was dismissed May 3, 1994 on a ruling that the attorney general lacked standing to bring common law charges. The remaining counts deal with consumer fraud and antitrust charges. *W. Va. Judge Strikes AG as Plaintiff on Most Counts; State Opposes Dismissal*, 10 Litig. Rep.: Tobacco No. 19 (Mealey's) 9 (Feb. 6, 1997).

94. Minnesota v. Philip Morris, Inc., C1-94-8565 (Minn., 2d Jud. Dist. Ct.). Much of the early battle in this state has surrounded discovery issues, including a tobacco industry request to depose individual Medicaid recipients allegedly treated for smoking-related diseases. *Industry Seeks to Depose Medicaid Recipients in Minnesota Action*, 9 Litig. Rep.: Tobacco No. 14 (Mealey's) 8 (Nov. 22, 1995). The state also sought discovery of the tobacco industry's litigation databases. *Id.* The Minnesota Supreme Court has held that Blue Cross and Blue Shield of Minnesota has standing to bring anti-trust and equitable claims, but its injury was too remote to bring tort claims. Minnesota v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996). Further, the

Washington,[96] Michigan,[97] Illinois,[98] Utah,[99] Arizona,[100] Kansas,[101] Oklahoma,[102]

"pass through defense" sought by defendants had been abolished by statute which allowed standing to bring consumer protection claims. *Id.* The U.S. Supreme Court refused to review a Minnesota state court ruling requiring the industry to turn over parts of its databases to the state. R.J. Reynolds Tobacco Co. v. Minnesota, 116 S. Ct. 1852 (1996) (mem.).

95. Harshbarger v. Philip Morris, Inc., No. 95-7378 (Mass., Middlesex Super. Ct.). The tobacco industry has countersued, and the attorney general has filed a motion to dismiss. *Massachusetts Action Marks Fifth Suit Against Industry Over Medicaid Expenses*, 9 Litig. Report: Tobacco No. 16 (Mealey's) (Dec. 21, 1995) [hereinafter *Massachusetts Action*] (citing Philip Morris v. Harshbarger, No. 95-12574-GAO (D. Mass.)). The tobacco industry removed the case to federal court only to have it remanded to state court due to lack of federal jurisdiction. 10 Litig. Rep.: Tobacco No. 3 (Mealey's) 10 (June 6, 1996). In a related claim, a federal district court ruled a Massachusetts statute requiring disclosure of ingredient and nicotine yield information by cigarette manufacturers is not pre-empted by the Federal Cigarette Labeling and Advertising Act. Philip Morris, Inc. v. Harshbarger, No. 96-11599-GAO, 1997 WL 106930 (D. Mass. Feb. 7, 1997).

96. Washington v. American Tobacco Co., No. 96-2-15056-8 (Wash., King County Super. Ct.). The tobacco industry argued for dismissal of claims for "breach of special duty" because the state failed to claim it suffered physical injury. On November 19, 1996, this claim and the claim for unjust enrichment were dismissed, with claims remaining for antitrust, injunctive relief, and damages for unfair competitive practices. *Most Washington Claims Stand; Special Duty, Unjust Enrichment Dismissed*, 10 Litig. Rep.: Tobacco No. 15 (Mealey's) 9 (Dec. 5, 1996).

97. Kelley v. Philip Morris, Inc., No. 96L13146 (Mich., Ingham County Cir. Ct.). Michigan has charged the industry with carrying out a conspiracy that has included concealing and distorting information. *Michigan Joins States Seeking to Recover Medicaid Monies*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 15 (Sept. 6, 1996).

98. Illinois v. American Tobacco Co. (Ill., Cook County Cir. Ct.). Illinois contends the industry engaged in unfair and deceptive trade practices by undertaking to deceive consumers and stifle competition, acting in a manner designed to promote illegal sales to minors, and forcing taxpayers to incur costs for health care. *Illinois Becomes 17th State to File Medicaid Action Against Tobacco Industry*, 10 Litig. Rep.: Tobacco No. 14 (Mealey's) 3 (Nov. 14, 1996).

99. Utah v. R.J. Reynolds Tobacco Co., No. 2:96 CV-0829W (D. Utah). Utah seeks to prevent continued violations of law and breaches of duties by the tobacco industry, recoup tobacco-related health care costs, cause disgorgement of defendants' related profits and gains, and recover punitive damages. *Utah Sues Tobacco Industry, Joining States Seeking Medicaid Reimbursement*, 10 Litig. Rep.: Tobacco No. 11 (Mealey's) 13 (Oct. 3, 1996). The tobacco industry brought a declaratory judgment action to keep the attorney general from "violating state law and circumventing legislative oversight" by illegally offering a contingent fee to lawyers participating in the litigation. *Utah Attorney General Hit with Preemptive Suit by Tobacco Companies*, 10 Litig. Rep.: Tobacco No. 6 (Mealey's) 19 (July 18, 1996).

100. Arizona v. American Tobacco, Inc., No. CV 96-14769 (Ariz., Maricopa County Super. Ct.). Arizona claims over 500,000 adult smokers and 75,000 users of smokeless tobacco. Arizona's complaint is similar to other states, alleging fraud and concealment. *Medicaid Reimbursement Suit Brought by Arizona*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 14 (Sept. 6, 1996).

101. Kansas v. R.J. Reynolds Tobacco Co., No. 96-CV-919 (Kan., Shawnee Dist. Ct.). The

Texas,[103] Louisiana,[104] Alabama,[105]Maryland,[106] New Jersey,[107] Connecticut,[108] and

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state charges the industry with conspiracy and alleges that it has manipulated nicotine levels in order to addict smokers. The state's complaint includes the law firms of Shook, Hardy, & Bacon of Kansas City, Missouri, and Jacob, Medinger, & Finnegan of New York, New York, as some of the "Doe" defendants. The state alleges that industry lawyers have controlled scientific research and have used false claims of attorney-client and work-product privilege to insulate research projects from disclosure. *Another Medicaid Recovery Action Filed by Kansas*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 16 (Sept. 6, 1996).

102. Oklahoma v. R.J. Reynolds Tobacco Co., No. CJ 96-1499-L (Okla., Cleveland County Dist. Ct.). This complaint is similar to Kansas' in that it includes law firms as defendants. Oklahoma puts forth 11 claims for unjust enrichment/restitution, indemnity, common law public nuisance, injunctive relief, violations of the Oklahoma Consumer Protection Act, strict liability, fraudulent misrepresentation and omission, negligent misrepresentation and omission, negligent performance of a voluntary undertaking, civil conspiracy, and aiding and abetting. *Three Industry Law Firms in Oklahoma's Medicaid Recovery Action*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 12 (Sept. 6, 1996).

103. Texas v. American Tobacco Co., No. 5-96CV-91 (E.D. Tex.). A trial date is set for September 29, 1997 in this case. The state alleges that the tobacco industry intentionally breached promises to study and report independently and honestly on the health effects of smoking and that safer cigarettes were suppressed by the industry. This complaint has 10 counts, including Federal Racketeer Influenced and Corrupt Organizations Act (RICO) violations. *Texas Files Medicaid Suit in Federal Court, Marking Seventh Such Case*, 9 Litig. Rep.: Tobacco No. 23 (Mealey's) 3 (Apr. 4, 1996).

104. Ieyoub v. American Tobacco Co., No. 96-1209 (La., 14th Jud. Dist. Ct.) This complaint alleges that the Council for Tobacco Research (CTR) (formerly the Tobacco Industry Research Commission) is a "front" for tobacco interests and did not make public health a primary concern or act to protect the public health. Instead, the complaint alleges that CTR coordinated an industry-wide strategy designed to mislead and confuse the public. *Louisiana Files Medicaid Action; Opts to Participate in Liggett Group Settlement*, 9 Litig. Rep.: Tobacco No. 22 (Mealey's) 11 (Mar. 21, 1996).

105. *Alabama Attorney General Won't Sue Industry Over Medicaid, Lt. Gov. Does*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 19 (Sept. 6, 1996). A complaint was brought as a private attorney general action by Lt. Governor Don Siegelman after the state's attorney general showed no interest in filing. The action is founded on principles of equity and under Alabama law to avoid multiplicity of suits in recovering damages. The complaint seeks unspecified damages, including punitive damages and prejudgment interest for claims which include: restitution/ unjust enrichment, indemnity, common law public nuisance, and injunctive relief. *See id.*

106. Maryland v. Philip Morris, Inc., No. 96122017/CL211487 (Md., Baltimore City Cir. Ct.). This complaint alleges conspiracy, fraud, antitrust and consumer protection law violations. The state seeks $3 billion in compensatory and $10 billion in punitive damages. The state alleges that the tobacco industry created "ongoing public health crisis of unrivaled proportions all the while knowing and appreciating" that the state would be required to pay for care of its indigent and needy citizens with smoking-related illnesses. *Maryland Claims Antitrust Violations, Conspiracy, Fraud in Medicaid Suit*, 10 Litig. Rep.: Tobacco No. 2 (Mealey's) 7 (May 16, 1996). The tobacco defendants removed to federal court, but the State successfully sought remand. The court

Iowa.[109] In addition, over a dozen cities and counties have filed similar suits against the industry.[110] The named defendants vary from claim to claim, but include[111] tobacco companies,[112] industry organizations,[113] and a public relations firm.[114] However, the states have taken different approaches to reach the goal of reimbursing their Medicaid coffers. For example, Mississippi's case marked the first time that any state government sought funds reimbursement for smoking-related illnesses.[115] Mississippi sought compensation for funds allocated to Medicaid, indigent care at state hospitals, and insurance for state workers and state

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concluded there was neither diversity nor a federal question to warrant removal. Maryland v. Philip Morris, Inc., 934 F. Supp. 173 (D. Md. 1996).

107. *Fifteen States Now Seek Medicaid Reimbursement; New Jersey is the Latest*, 10 Litig. Rep.: Tobacco No. 10 (Mealey's) 6 (Sept. 19, 1996). This article discusses New Jersey v. R.J. Reynolds Tobacco Co. (N.J. Super. Ch. Div.). This complaint sounds in equity, statutory law and common law. The state indicates that it brings its complaint pursuant to its common law parens patriae power in order to vindicate the state's interest in protecting children. The claims set forth include unjust enrichment/restitution, indemnity, consumer protection and civil RICO. The state also seeks an injunction preventing the tobacco industry from any further acts of conspiracy or marketing to minors. *Id.*

108. Connecticut v. Philip Morris, Inc. (Conn., Stamford Super. Ct.). The state filed a $1 billion claim despite the tobacco industry's preemptive suit designed to prevent this filing. (The preemptive suit was later dismissed under the "*Younger* doctrine" which requires federal court abstention in an ongoing state proceeding under listed conditions. Philip Morris, Inc. v. Blumenthal, 949 F. Supp. 93 (D. Conn. 1996)). Connecticut stated that it spends $260 million per year treating tobacco-related diseases. Connecticut will receive $250,000 per year from Connecticut Blue Cross/ Blue Shield for four years to help defray costs of litigation. *Connecticut Files Medicaid Suit, Seeks $1 Billion from Tobacco Industry*, 10 Litig. Rep.: Tobacco No. 7 (Mealey's) 4 (Aug. 1, 1996).

109. *Nineteen States Now Seek Medicaid Recovery from Tobacco Industry; Iowa is the Latest*, 10 Litig. Rep.: Tobacco No. 16 (Mealey's) 5 (Dec. 19, 1996). This article discusses *Iowa v. R.J. Reynolds Tobacco Co.* (Iowa, Polk County Dist. Ct.). Iowa seeks millions of dollars in restitution and damages from tobacco companies and their research associations and alleges the defendants violated the state's consumer fraud act by "repeatedly and systematically" misleading the public about alleged dangers of smoking and failing to disclose its knowledge on the addictive nature of smoking. *Id.*

110. *See* Hansen, *supra* note 90, at 52.

111. *See id.*

112. American Tobacco Co., Brown & Williamson Tobacco Corp., B.A.T. Industries (the parent company of Brown & Williamson), Liggett & Myers, Lorillard Tobacco Co., Philip Morris, R.J. Reynolds, and United States Tobacco Co. *Id.*

113. Council for Tobacco Research, Smokeless Tobacco Council, and the Tobacco Institute. *Id.*

114. Hill & Knowlton. *Id.*

115. *See* MacLachlan, *supra* note 91.

retirees.[116] Minnesota alleges antitrust and consumer protection law violations.[117] Massachusetts alleges a conspiracy among tobacco companies to mislead smokers as to the dangers of cigarettes and seeks to require tobacco companies to release their research on smoking and addiction and to fund an educational program for smokers.[118]

Prior to the filing of their lawsuits, Florida and Massachusetts passed legislation which serves as the basis for their claims against the tobacco companies for reimbursement of Medicaid costs.[119]

Tobacco companies have responded to all these suits in the aggressive manner with which they have won against individual consumers in the past. Tobacco companies have countersued in Florida questioning the constitutionality of the Medicaid Third Party Liability Act.[120] They have also countersued in Massachusetts alleging that the provisions of the statutes which allow the actions do not allow for retroactive application of the imposition of any liability upon manufacturers unless plaintiffs establish that a particular manufacturer is liable to a Medicaid recipient.[121] Furthermore, they argue that the provisions violate their rights under federal constitutional and statutory law—that they constitute an improper and illegal attempt to burden interstate commerce and violate the Due Process Clause, Equal Protection Clause, Takings Clause, Ex Post Facto Clause, Bill of Attainder Clause and the First Amendment.[122]

In West Virginia, where much of the suit has already been dismissed, tobacco companies successfully prevented the attorney general from using outside law firms to prosecute the state's claim by demonstrating that the compensation for the outside firms had not been approved by the legislature and then arguing that the attorney general was spending public funds without authority.[123] In Minnesota, tobacco companies are requesting the opportunity to depose individual Medicaid recipients who allegedly suffer from tobacco-related illnesses in order to "narrow and clarify the issues and shape the development of the case."[124] Because Minnesota is attempting to use aggregate proof, the tobacco companies argue that they will not be afforded the opportunity to show that any individual Medicaid recipient was not injured or did not suffer injury related to tobacco.[125]

One "incentive" for states to throw their hats in the ring was a proposed

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116. *See id.*

117. *See id.*

118. *See Massachusetts Action, supra* note 95.

119. *See* Reuters, *Minnesota Joins Campaign Against Tobacco Companies*, L.A. TIMES, Aug. 20, 1994, at D3.

120. FLA. STAT. ANN. § 409.910 (Supp. 1997).

121. *See* Philip Morris, Inc. v. Harshbarger, No. 95-12574-GAO (D. Mass).

122. *Massachusetts Action, supra* note 95.

123. *See West Virginia Judge Enters Order on Fee Arrangement*, 9 Litig. Report: Tobacco No. 16 (Mealey's) 10 (Dec. 21, 1995).

124. *See Industry Says Depositions of Medicaid Recipients Needed to Frame Minnesota Case*, 9 Litig. Report: Tobacco No. 16 (Mealey's) 9 (Dec. 21, 1995).

125. *See id.*

settlement being discussed in early 1996. Under the discussed terms, the tobacco companies would have contributed up to $130 billion toward the treatment of smoking-related illnesses over a fifteen-year period in exchange for immunity from future lawsuits and continued freedom from federal regulation.[126]

These cases are all being followed closely by the media, citizens action groups, politicians, and the tobacco industry. The degree of success of these early cases will determine how other states will proceed. For the purposes of this Note, only the litigation based on legislative action will be considered, with emphasis on the Florida statute.[127] A similar analysis could be used for other types of litigation.

IV. THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause will control decisions regarding the constitutionality of state legislatures singling out one industry in order to obtain reimbursement for Medicaid expenses in treating citizens harmed through the use of the product. To make this decision, it is necessary to understand the basis of the Clause, the history of its application, and the process which a court will use to evaluate each case.

A. Foundations of the Equal Protection Clause

The Fourteenth Amendment[128] was adopted in 1868 as part of the country's effort to restore the Union following the Civil War. The objective of guaranteeing "equal protection" was apparent in every draft of the amendment.[129] The Framers' original understanding of "equal protection" is unclear, however, because there was no prior history of the usage of the term.[130] Further, the first section of the

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126. *See* Hansen, *supra* note 90, at 51. One report indicated a legislative proposal in Washington, D.C. which would have provided $6 billion in 1997 and $10 billion per year for the next 11 years to settle the Medicaid reimbursement claims. This money would be used to partially meet the state claims, provide some compensation to individuals and fund Department of Health and Human Services programs targeting minors through anti-smoking ads. *Proposed Legislative Deal Would Shield Tobacco Industry for 15 Years*, 10 Litig. Rep.: Tobacco No. 9 (Mealey's) 7 (Sept. 6, 1996).

127. FLA. STAT. ANN. § 409.910 (West Supp. 1997).

128.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

129. *See* Note, *Developments—Equal Protection*, 82 HARV. L. REV. 1065, 1068 (1969) [hereinafter Note, *Equal Protection*].

130. *See id.* (citing John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 138-40 (1950)).

Amendment, which contains the Equal Protection Clause,[131] was given "only general attention" by the Congress.[132] Two views emerged: one which proposed that the rights be limited to the "civil rights" enumerated in the Civil Rights Act of 1866;[133] and the other favoring a broad coverage that could expand with changing circumstances.[134] Professor Bickel proposed that the Clause was amenable to a twofold interpretation: first, the protection of "specific 'civil rights' without contemplation of such changes in the social order as desegregation would entail"; but, second, "the amendment was also fitted for expansion in changing circumstances."[135]

The Equal Protection Clause was "designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights—especially life, liberty, and property—and to do so equally."[136] This duty was not merely to enforce the law in an equal manner, but to assure that the law itself was equal.[137] The Equal Protection Clause has operated to limit permissible legislative classification, to oppose "discriminatory" legislation, and to impose "substantive" limits upon the exercise of the police power.[138]

The Equal Protection Clause is limited in application to state action. State action obviously would include formal operation of a state agency, but other forms of state action have also been recognized.[139] State action could include state legislation and municipal ordinances, activities of state or local officials operating under "color of law," and judicial enforcement of private agreements.[140] Further, activities of a nominally private party over which the state exercises control

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131. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

132. Note, *Equal Protection*, *supra* note 129, at 1069 (citing Frank & Munro, *supra* note 130, at 138-40).

133. ch. 31, 14 Stat. 27.

134. Note, *Equal Protection*, *supra* note 129, at 1069.

135. *Id.* (citing Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59-63 (1955)).

136. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949).

137. *See id.* at 342. "The equal protection of the laws is a pledge of the protection of equal laws." *Id.* (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (Matthews, J.)).

138. *See id.* at 342-43.

139.

> [T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.

Note, *Equal Protection*, *supra* note 129, at 1070 n.35 (quoting United States v. Guest, 383 U.S. 745, 755-56 (1966)).

140. *See id.* at 1070-71.

through financing or through appointment or regulation of agents as administrators[141] may be considered state action. A test for state action may be to look at "the sum of the indicia of state involvement."[142] Still another type of state action is apparent when private parties perform public functions ordinarily carried on by a public agency, such as maintaining streets, operating public parks, and conducting party primaries in the electoral process.[143] However, later decisions have found no state action where a private nursing home acts in accordance with Medicaid regulations[144] or in the case of a heavily regulated, state-subsidized private school specializing in students with special needs.[145] State legislation allowing Medicaid reimbursement claims against a third party is clearly within the definitions of state action so the constraints of the Equal Protection Clause will apply.

B. Classifications under the Equal Protection Clause

The Equal Protection Clause represents a point of conflict within the political process whereby a state is required to provide equality in its laws, but the very nature of establishing law requires classification of actions or individuals in order to maintain the police power or otherwise effect state policy.[146] Any classification made in a legislative process is subject to the challenge of the Equal Protection Clause. One formula used to consider the validity of a classification scheme is to determine whether it includes "all [and only those] persons who are similarly situated with respect to the purpose of the law."[147] "Equal protection of the law requires that persons similarly circumstanced be treated alike, . . . but equal protection does not deny states the power 'to treat different classes of persons in different ways.'"[148]

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141. *See id.* at 1071.

142. *Id.*

143. *See id.*

144. *See* Blum v. Yaretsky, 457 U.S. 991 (1982).

145. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

146.

> The classical statement of this unchallenged view is found in *Barbier v. Connolly*: . . . neither the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts . . . Special burdens are often necessary for general benefits. . . .

113 U.S. 27, 31 (quoted in Tussman & tenBroek, *supra* note 136, at 343).

147. *See* Note, *Equal Protection*, *supra* note 129, at 1076 (citing Tussman & tenBroek, *supra* note 136, at 346).

148. Reed v. Reed, 404 U.S. 71, 75 (1971) (citations omitted).

When a state uses a definition of a group to define to whom a regulation applies or benefits, the classification used "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike."[149] The Court has been reluctant to practice a general policing of legislative purpose and instead has delineated a small number of interests which it holds are given special protection through the Equal Protection Clause.[150] Among the classifications delineated are race,[151] alienage,[152] illegitimacy,[153] and gender.[154]

Classifications may be under-inclusive, over-inclusive or both. An under-inclusive classification is one which consists of all similarly situated people, but not all those who are similar in terms of the purpose of the law.[155] Under-inclusiveness which is based on deliberate choice not to include others has been considered reasonable where the legislating body found no compelling evidence that extension of the rule was necessary to fulfill the purpose of the rule.[156] "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[157] Under-inclusive burdens may be viewed less strictly by the court where a rational relationship is shown and the party being burdened is properly identified as worthy of the burden.[158] In addition, the legislature may seek to address specific groups contributing to a social problem on a "one step at a time basis."[159] Under-inclusive classifications which are upheld often appear in general as economic or social welfare regulations where the court does not require

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149. *Id.* (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

150. *See* Edward L. Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications,* 68 KY. L.J. 845, 852 (1979-80).

151.

> Discrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States, including the Fourteenth Amendment, were aimed. The Equal Protection Clause was central to the Fourteenth Amendment's prohibition of discriminatory action by the State: it banned most types of purposeful discrimination by the State on the basis of race in an attempt to lift the burdens placed on the Negroes by our society.

Id. at 852 n.26 (quoting Rose v. Mitchell, 443 U.S. 545, 554-55 (1979)).

152. *See id.* at 852 n.27 (citing Graham v. Richardson, 403 U.S. 365 (1971), Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978)).

153. *See id.* at 853 n.28.

154. *See id.* at 853 n.29. The court uses a special intermediate level of review for gender issues. Craig v. Boren, 429 U.S. 190, 197 (1976), *accord* United States v. Virginia, 116 S. Ct. 2264 (1996).

155. *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.2 (3d ed. 1986).

156. *See id.*

157. Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955).

158. Note, *Equal Protection, supra* note 129, at 1084-86.

159. *Williamson*, 348 U.S. at 489.

legislative demonstration of a very close relationship between classifications and purposes of the statute.[160]

An over-inclusive law includes all who are similarly situated in terms of the law, but also includes additional persons.[161] Over-inclusiveness likely will not result in the invalidation of the law, however, if the classification has some reasonable basis. "[I]t does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"[162]

C. Standards of Review

Challenges to the Equal Protection Clause are reviewed using one of three approaches: strict scrutiny, intermediate, or rational relationship. Each of these standards is focused on the state's use of the classification in question and the relationship between the classification and the purpose of the law or state action—not the individual's placement within the classification. In general, courts are expected to avoid intrusion into legislative policy-making, so one would expect considerable judicial deference to legislative decisions. This deference is the basis for the rational relationship test. However, history has shown that legislative decisions are not always consistent with constitutional demands. As a result, the courts have carved out areas in which less deference to judicial decision-making is shown and the required demonstration of the state's purpose will be more extensive. Each of the standards applies to a discrete set of circumstances and will be discussed separately, starting with the strictest test.

1. The Strict Scrutiny Test.—The strict scrutiny test is the most "demanding" of the tests. Here, the court will not defer to the legislature, but will instead look at the degree of relationship between the classification and a constitutionally justifiable end.[163] This test may be used whether the classification, on its face, appears discriminatory[164] or neutral.[165] Courts generally will exercise this standard of review where a governmental act classifies people in terms of their ability to exercise a fundamental right[166] or where the classification distinguishes

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160. NOWAK ET AL., *supra* note 155, at § 14.2.

161. *Id.*

162. Heller v. Poe, 509 U.S. 312, 320 (1993) (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

163. Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995).

164. "[T]he fact of equal application does not immunize [a] statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." Loving v. Virginia, 388 U.S. 1, 9 (1967).

165. "Though the law itself be fair on [the] face yet, if it is applied and administered by public authorit[ies] with an evil eye and an unequal hand, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373, 374 (1886).

166. Examples of the strict scrutiny test applied to classifications affecting fundamental rights include: the right to engage in "core political speech" (McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995)) the right to marry (Zablocki v. Redhail, 434 U.S. 374 (1978)), the right to

between persons, in terms of any right, upon some "suspect" basis.[167] When legislation is tested in court, the government has the burden of proving that the particular constraint on a constitutional interest is consistent with the scope of the protection given to the interest.[168]

2. The Intermediate Test.—This test is an independent, but not technically "strict scrutiny," review.[169] Generally, this standard is used only in review of gender-based classifications. The 1970s saw an increasing emphasis on the rational relationship scrutiny which eventually resulted in creation of this middle tier of intermediate review.[170] This test was first explicitly used in 1976 in *Craig v. Boren,*[171] but some commentators have argued that the court used this standard tacitly while purportedly using a rational basis test.[172]

The Supreme Court has outlined a two-step process which assures that a classification is "applied free of fixed notions concerning the roles and abilities of males and females . . . . Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[173] This two-step process asks (1) whether the state's objective is "legitimate and important," and (2) whether "requisite direct, substantial relationship between objective and means is present."[174] Using this test, the Court found Mississippi's women-only admission policy at a state-supported nursing school to be unconstitutional.[175]

3. The Rational Relationship Test.—The rational relationship test gives the greatest deference to the legislative process. Although it seems clear on face value that the Court conducts a genuine review, the scope of the review is not clear.[176]

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travel (Shapiro v. Thompson, 394 U.S. 618 (1969)), the right of political association (Williams v. Rhodes, 393 U.S. 23 (1968)), and the right to vote (Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)).

167. "Certain classifications, such as those based on race, lineage, and alienage, are said to be 'suspect' and a 'very heavy burden of justification' may be demanded of a state which draws such a distinction." Note, *Equal Protection*, *supra* note 129, at 1088. Suspect classes include race (Loving v. Virginia, 388 U.S. 1 (1967)), alienage (Plyler v. Doe, 457 U.S. 202 (1982)), and national origin (Hernandez v. Texas, 347 U.S. 475 (1954)).

168. Barrett, *supra* note 150, at 847.

169. NOWAK ET AL., *supra* note 155, § 14.3.

170. D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 73 (1993).

171. 429 U.S. 190 (1976) (holding unconstitutional a law prohibiting sale of 3.2% beer to males under the age of 21 and to females under 18 because statistics offered by the state did not establish that the gender discrimination was closely related to the objective of the law).

172. Welch, *supra* note 170, at 73 (citing Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971), and Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1149-50 (1987)).

173. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982).

174. *Id.* at 725-26.

175. *See id.*

176. *See* Barrett, *supra* note 150, at 857.

At one end of the spectrum are cases where the Court indicates it is giving great deference and shifts to the attacker of the statute the "impossible burden of convincing the Court that no state of facts 'reasonably may be conceived to justify' the classification."[177] The challenger must therefore show that no reasonable governmental decision-maker could have found the legislative facts upon which the classification is based to have been true.[178] On its face, this would suggest that review is limited to examining the challenger's arguments, but many opinions have shown a broader review was being used.[179] It would appear that courts are reexamining the reasonableness of the legislature's judgment and that in cases where the state's justifications are weak, the Court may find a statute invalid.[180] The other end of the spectrum are cases which suggest that "[f]or all practical purposes, persons attacking statutes under equal protection cannot expect to succeed unless they persuade the Court to categorize the statutes as involving suspect classifications or specially protected interests."[181]

The test used to determine the rational relationship is two-fold: "(1) [d]oes the challenged legislation have a reasonable purpose? and (2) [w]as it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?"[182] Further, parties who challenge state action under the Equal Protection Clause "cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.'"[183]

The court will not look to underlying motives for creating the classification

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177. *Id.* at 858 (quoting Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 64 (1978)).

178.

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Id. at 858 (citing Vance v. Bradley, 440 U.S. 93, 97 (1979)).

179.

> In *Holt Civic Club v. Tuscaloosa*, the Court articulated the standard as being whether any state of facts could reasonably be held to justify the classification, but actually examined the justifications given for the classification and concluded that the statute was a rational legislative response to the problems faced by the State's burgeoning cities.

Barrett, *supra* note 150, at 859 (quoting *Holt Civic Club*, 439 U.S. at 75).

180. *See id.* at 860.

181. *Id.* This amounts to a strict application of the rule that ordinary social and economic classifications are to be presumed valid with the challenger bearing the virtually undischargeable burden of showing that no facts could reasonably be found to justify the statute. *Id.*

182. Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981).

183. *Id.* at 674 (quoting United States v. Carolene Prods. Co, 304 U.S. 18, 154 (1938)).

without circumstances which induce heightened judicial scrutiny.[184] When the statute does not involve suspect classifications such as race, alienage, or national origin, or "quasi-suspect" classifications such as gender or illegitimacy, or where the statute does not involve personal or fundamental rights, the court is entitled to presume that the statute is valid, and it is not required to delve into the motivations of the body that drafted the legislation.[185] "[W]hile courts may look to legislators' motives where a suspect or quasi-suspect classification is subjected to discrimination or a fundamental right is infringed, absent these circumstances, we 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'"[186] This is the standard which will be used to review tobacco company claims.

D. Legislative Purpose

Purpose is "an objective, collective concept and is identified through 'the terms of the statute, its operation and [its] context."[187] Motive, on the other hand, is the subjective mission of individual legislators.[188] Although the Supreme Court has often been faced with deciding whether a purpose is permissible under the rationality test, it has not specified a clear criteria to be used in defining permissible (or impermissible) legislative purposes.[189] The Court has found that a preference for one group over another is not permissible, but preferential or burdensome effects on one group are permissible, "so long as the purpose of the law is not discriminatory, but rather to achieve some broader goal."[190] In *United States Department of Agriculture v. Moreno,*[191] the Supreme Court held that a rule was not rationally related to a state interest because "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[192] In order for the government interest to be legitimate, the harm presented to a specific group must be justified by "reference to [some

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184. *See* International Paper Co. v. Town of Jay, 928 F.2d 480, 485 (1991).

185. *See id.* at 485 n.2 (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985)).

186. International Paper Co. v. Town of Jay, 928 F.2d 480, 485 (1st Cir. 1991) (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).

187. Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 5 (1992) (quoting Note, *Equal Protection*, *supra* note 129 at 1091).

188. *See id.*

189. *See id.* at 17.

190. *Id. See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding a military order forbidding persons of Japanese ancestry from entering a military area as justified in order to prevent espionage, but not as an expression of racial antagonism); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (allowing use of admissions preferences for students of a particular race, but not as an expression of racial preference for its own sake).

191. 413 U.S. 528 (1973).

192. *Id.* at 534 (overturning a Food Stamp rule where the legislative history indicated the purpose was to prevent "hippie communes" from participating in the Food Stamp Program).

independent] considerations in the public interest."[193]

In all cases, a law can be expected to have both positive and negative impacts on the citizens subject to it. Justice Stevens explained that the "impartial lawmaker" recognizes this, but is willing to burden the disadvantaged party when the public purpose being served transcends the harm being caused to one class.[194] Even where the legislature has miscalculated the benefits or burdens, the law will not be invalidated. "[R]ationality review cannot be said to prohibit unwise or foolish laws, but rather only biased laws."[195] The Court has also defined the standard by way of the term "invidious discrimination,"[196] meaning "with an evil eye and an unequal hand"[197] or motivated by a "feeling of antipathy"[198] against a specific group.

In reviewing the relationship between the legislative purpose and the classification using the highly deferential reasonable relationship standard, evidence of actual purpose "is only minimally relevant to what [is] material—whether there exists a conceivable legitimate purpose for the legislation."[199] Identification of the purpose is a "purely intellectual exercise, limited only by the imagination of the court.[200] Generally, a court will uphold a classification "if any state of facts reasonably may be conceived to justify it."[201]

V. Analysis: Is the Tobacco Solution Valid?

A. The Standard for Reviewing the Tobacco "Actions"

The tobacco "actions" will most likely be evaluated under the rational relationship test because they do not single out a suspect class, nor do they involve a fundamental right. Where neither a suspect class nor a fundamental right is infringed by the act, there is no justification for stricter scrutiny. In this case, an industry is being identified[202] as creating medical conditions which lead to costs

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193. *Id.* at 534-35 (quoting Moreno v. United States Dep't of Agric., 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)).

194. Farrell, *supra* note 187, at 18 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring)).

195. *Id.*

196. Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955).

197. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

198. Soon Hing v. Crowley, 113 U.S. 703, 710-11 (1885).

199. Farrell, *supra* note 187, at 41.

200. *See id.* at 23.

201. McGowan v. Maryland, 366 U.S. 420, 426 (1961) (state statute allowing only certain merchants to be open on Sunday did not violate Equal Protection Clause where legislature could reasonably find it was necessary for the health of the populace or for enhancement of the recreational atmosphere of the day).

202. Under such circumstances, a legislator will probably be cognizant of the implications of identifying any one industry. As happened in Florida, legislators were confronted with an unhappy industry which threatened to cut contributions or otherwise affect individual legislators.

to the state through Medicaid and indigent care. The industry is an economic enterprise, operated for profit by several large corporations. The cost to the state is a social cost expressed both as the direct expenses of Medicaid in order to care for the public health and also as the indirect cost of taking funding from other social programs. In addition, the state suffers due to the loss of productivity of the individuals who suffer tobacco-related illnesses, although this indirect cost is not reflected in the reimbursement actions. "Social or economic legislation . . . which purports to protect the health and safety of [the state's citizens], is presumed to be valid and not violative of . . . the Equal Protection Clause[] 'if the classification drawn by the statute is rationally related to a legitimate state interest.'"[203] Therefore, under the rational relationship test, the tobacco actions will be presumed to be valid and not violative of the Equal Protection Clause if the classification is shown to be rationally related to a legitimate state interest.

B. Applying the Two-Fold Test for Rational Relationship[204]

1. "Does the Challenged Legislation Have a Reasonable Purpose?"[205]—Florida has stated that the purpose of the Medicaid Third-Party Liability Act[206] is that "Medicaid be the payer of last resort for medically necessary goods and services furnished to Medicaid recipients. . . . If benefits of a liable third party are available, it is the intent of the Legislature that Medicaid be repaid in full."[207] The state achieves this purpose by providing methods of obtaining reimbursement, including claims directly against the third party in which the recipient of Medicaid benefits is not involved. The reasons for seeking Medicaid reimbursement are to protect both the financial well-being of the state and the physical well-being of its citizens by replenishing the funding source used to purchase health care services. Smokers and tobacco companies will probably argue, not without some element of truth, that they are being singled out because smoking is currently "socially immoral." Although reduction in tobacco company profits or in cigarette consumption related to higher prices may be a logical outcome of a court-ordered reimbursement, these are not the primary purposes of the states' actions. Even under claims of unjust enrichment, states are not alleging fault, but merely asking equity to distribute money in a fair manner so no party

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The legislature attempted to repeal the law, but they were unable to override the Governor's veto of the repealed law. *Chiles Vetoes Repeal of Florida Tobacco Law*, 9 Litig. Report: Tobacco No. 4 (Mealey's) 27 (June 22, 1995). Other industries have sued Florida alleging this action is unconstitutional.

203. International Paper Co. v. Town of Jay, 928 F.2d 480, 484 (1st Cir. 1991) (quoting Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

204. *See supra* note 182 and accompanying text.

205. Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 674 (1981) (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 154). *See supra* note 182 and accompanying text.

206. FLA. STAT. ANN. § 409.910 (West Supp. 1997).

207. *Id.* § 490.910(1).

benefits to another's detriment. Arguably, however, even if this were considered a purpose of the actions, restricting tobacco use would be well within the state's police power to protect the public health.

Noting the large Medicaid expenditures being made by states to care for illness and injury caused by tobacco[208] and seeking alternative means of funding their Medicaid budgets at adequate levels for the growing number of recipients,[209] the "reasonable legislature" would believe that this type of state action is a legitimate means of addressing the public health concerns of the state. It is also reasonable that the legislature would not think it necessary to specify each different type of industry from whom it might seek reimbursement. It would be inefficient to create an exclusive list, rather with the written purpose available, it could be directed at any third-party or at no third-party as indicated by the circumstances.

"Revenue raising is undoubtedly a legitimate and substantial governmental objective."[210] In the case of this tobacco litigation, the revenue being raised is a replacement for the costs that the state incurs as a result of the tobacco companies' ability to merchandise their product to state residents. Clearly, the purpose of the legislation is to raise revenue to meet a significant state interest in continued funding of the Medicaid program as well as to provide for the health and welfare of the citizens of the state.

2. *"Was It Reasonable for the Lawmakers to Believe That Use of the Challenged Classification Would Promote That Purpose?"*[211]—The state claims for Medicaid reimbursement target only tobacco companies.[212] There are certainly other industries that, at least arguably, affect the general public health and create expenses to Medicaid. For this reason, the classification may be under-inclusive. An under-inclusive classification "contains all similarly situated people, but excludes some people who are similar to them in terms of the purpose of the

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208. *See supra* note 55 and accompanying text.

209. *See supra* note 26 and accompanying text.

210. Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 825 F.2d 367, 373 (11th Cir. 1987). *See also* Gannett Satellite Info. Network v. Metropolitan Transp. Auth., 745 F.2d 767, 775 (2d Cir. 1984).

211. Western & S. Life Ins. Co., 451 U.S. at 674 (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 154). *See supra* note 182 and accompanying text.

212. The Florida statute does not specifically identify tobacco companies. FLA. STAT. ANN. § 409.910. It is written to include all third-parties who benefit from the Medicaid program or who are liable for the costs to the Medicaid program. This could include tortfeasors in personal injury or medical malpractice, insurance companies, or other industries who produce and sell products that cause harm. Florida Governor Chiles has argued that the statute will only be used against tobacco companies, however, a Florida trial court has ruled that this executive order is non-binding on the State. Agency for Health Care Admin. v. Associated Indus., Inc., 678 So. 2d 1239, 1257 (Fla. 1996) (Wells, J., concurring), *cert. denied*, 117 S. Ct. 1245 (1997). This issue was not raised on appeal. *Id.* This ruling allows non-tobacco plaintiffs to remain in a suit with Philip Morris against the state of Florida. *Medicaid Suits: Non-Tobacco Industry Parties Remain in Florida Action*, 9 Litig. Rep.: Tobacco No. 2 (Mealey's) 22 (May 22, 1995) [hereinafter *Medicaid Suits*].

law."[213] It is at least arguable that other industries, such as alcohol and motor vehicles, contribute to increased health care costs and should be included in this initiative. However, tobacco causes considerably more "preventable" deaths (19%) than other "preventable" causes, including alcohol (5%), firearms (2%), motor vehicles (1%), and illicit drugs (less than 1%).[214] Other "preventable" causes of death are not traceable to a particular product or industry.[215] Although tobacco is not the only "preventable" cause of death, it is readily identifiable and causes the largest proportion of "preventable" deaths of the major industries that might be targeted.

The Florida legislation being used does not specify one industry, although its unstated intent may be to focus on tobacco. Because this intent is not clearly limited, other industries could be pursued in the future if the circumstances warranted.[216] As the Supreme Court has observed, a "law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[217] Further, "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."[218] Therefore, although a better classification may be envisioned by the tobacco companies, any imperfection in the definition will not make the act unconstitutional as long as it may be shown to have been considered an appropriate legislative measure.

Singling out one industry to try to resolve a particular public health crisis is well within the police power of a state. Where there are social or economic conditions which a state must address, the state is given considerable deference on review. There is a rational relationship between the state's purpose of making Medicaid a "provider of last resort" and targeting any party who contributes to the use of Medicaid funds or who profits from those funds.

C. Outcome of the Rational Relationship Review

The legislature has a legitimate purpose in raising revenue by seeking reimbursement of the funds expended by Medicaid from liable third parties. There

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213. Barnhorst v. Missouri State High Sch. Activities Ass'n, 504 F. Supp. 449, 459 (W.D. Mo. 1980) (quoting NOWAK ET AL., CONSTITUTIONAL LAW 521 (1978)).

214. *See* Bartecchi et al., *supra* note 38, at 46 (Table).

215. Diet/activity patterns (14%); microbial agents (4%); toxic agents (3%); sexual behavior (1%). *Id.*

216. Tobacco companies are using this information to their advantage in bringing suits challenging the constitutionality of the Florida statute. By introducing this argument, they have brought other industries into the lawsuit and put considerable political pressure on the legislators backing the law. *See Medicaid Suits*, *supra* note 212.

217. Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955)).

218. *Barnhorst*, 504 F. Supp. at 460 (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

is a clear connection between the stated purpose and the classification used in the legislation because the targeted industry contributes to health care costs. A classification will be upheld "if any state of facts reasonably may be conceived to justify it."[219] Although there may have been another way to write this legislation in order to more carefully target the third parties causing such harm, the Constitution is not offended because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[220] If this legislation creates burdens that are under-inclusive, it will be enough that "there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[221]

CONCLUSION

The economic crisis facing state Medicaid programs is clearly daunting. Federal regulations and court opinions continue to expand mandatory coverage areas; federal budget deficits continue to dominate political agendas; and the needs of those covered by Medicaid increase. State legislatures have tried to find "creative" means of funding Medicaid through voluntary donations and special taxes, but have been stopped by federal legislation designed to curb spiraling medical costs.

Adding to this bleak picture, huge numbers of people are harmed by cigarette smoking despite decades of action by the government to provide greater education to deter smoking. The federal government seems unwilling to further tax tobacco or to halt subsidies which might cause increased cigarette costs and curb some tobacco use. Further, tobacco companies have consistently avoided any liability for the costs of smoking to individual consumers, which casts much of the burden of caring for those harmed upon the general population through public assistance programs such as Medicaid.

Frustrations with this process have led states to seek direct reimbursement from the tobacco companies for the harm done to the Medicaid system by the use of tobacco. Tobacco companies have screamed "foul" at being the only targeted industry, yet the available statistics suggest that tobacco is the worst offender of the products which cause "preventable" deaths. Legislatures are clearly within the bounds of "reasonable" legislative action when they target such an industry for the joint goals of preserving the health of the citizenry and raising revenue for the maintenance of their respective states' health care programs.

The Equal Protection Clause requires only a rational relationship between the classification and the legislative purpose. The test demands a showing that the challenged legislation has a reasonable purpose and that it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose. That is the case here because a direct nexus can be shown between the purpose of reimbursing medical costs and the product which contributes to the

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219. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

220. *Dandridge*, 397 U.S. at 485.

221. *Williamson*, 348 U.S. at 487-88.

costs. Therefore, there is no barrier under the Equal Protection Clause to an action for reimbursement of Medicaid funds from a specific industry which reaps considerable financial benefit from the sale of its products, but which causes significant state funds to be expended to treat the harms its products cause.

Although these legislative actions are probably constitutional under an Equal Protection analysis, they may run afoul of other constitutional provisions.[222] They are also not a "sure-fire" way of reimbursing Medicaid expenses. They will still face the highly successful tobacco companies in a battle where the defendants have plenty of money and strong precedent to fuel their fight, while the states must overcome over 300 cases that have been in the tobacco companies' favor—and do it under the economic constraints of a government budget. Neither the Florida statute nor the common law experiences in the other states will eliminate the burden of proving all of the elements of the states' claims. In addition, whether this type of action is the best means of resolving this problem remains to be seen. The political "fallout" that individual legislators experience as a result of supporting such actions may prevent other states from following a similar course. However, if any of these suits succeeds, this type of legislation could become common across the country.

EPILOGUE

One of the difficulties in writing about contemporary legal issues, particularly those which are gaining the national spotlight, is that these issues often progress too quickly for a law review note to address in a timely fashion. Certainly, the state actions against the tobacco industry are a good example of this problem. For instance, between January 1, 1997 and June 20, 1997, the number of states suing tobacco companies rose to forty. On June 20, 1997, lawyers representing these forty states announced that an agreement had been reached by which the tobacco industry would pay $368.5 billion over twenty-five years and would submit to significant new rules.[223]

The terms of the agreement are complex and cover a wide range of issues, including an expansion of the Food and Drug Administration's regulation of nicotine-containing tobacco products in areas such as advertising and youth

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222. For further information, see Michael K. Mahoney, *Coughing the Cash: Should Medicaid Provide for Independent State Recovery Against Third-Party Tortfeasors Such as the Tobacco Industry?*, 24 B.C. ENVTL. AFF. L. REV. 233 (1996); William W. Van Alstyne, Commentary, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 FLA. L. REV. 563 (1994); Mark D. Fridy, Note, *How the Tobacco Industry May Pay for Public Health Care Expenditures Caused by Smoking: A Look at the Next Wave of Suits Against the Tobacco Industry*, 72 IND. L.J. 235 (1996).

223. *See* Henry Weinstein & Myron Levin, *$368 Billion Tobacco Accord; Deal with States Would Restrict Marketing; Health: Under the Settlement, Cigarette Firms Would Reimburse Medical Care Costs and Fund Stop-Smoking Programs, But Would Win Limits to Their Legal Liabilities. Congress and the President Must Approve the Deal*, L.A. TIMES, June 21, 1997, at A1.

tobacco usage.[224] It also sets national standards for second-hand smoke.[225] It would also free the tobacco industry from litigating forty lawsuits with the states and eliminate the prospects of class-action claims by smokers.[226]

Although they have reached an agreement, this litigation is far from settled. The next step, of course, is to gain approval from both Congress and the White House. The road ahead is bound to be full of challenges for both sides as they work to convince the legislators and the public in general that this agreement is in everyone's best interest. However, whatever the outcome, this litigation and the underlying state legislative action have been ground-breaking. Could this become an economic weapon to control industries which are deemed "socially unacceptable?" More importantly, is there a point when a legislative solution becomes unreasonable?

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224. *Excerpts From Agreement Between States and Tobacco Industry*, N.Y. TIMES, June 25, 1997, at B8.

225. *Id.*

226. *See* Sam Fulwood III, *Congress Eyes Tobacco Pact Warily; Settlement: Perhaps Daunted by the Deal's Complexity, Lawmakers Seem to be Waiting for Experts and the Public to Weigh in First*, L.A. TIMES, June 30, 1997, at A15.

MAIL ORDER RETAILERS AND COMMERCE CLAUSE NEXUS: A BRIGHT LINE RULE OR AN OPAQUE STANDARD?

MATTHEW T. TROYER*

INTRODUCTION

Do you buy mail order products to avoid paying the sales tax? Chances are that you do, as do millions of other Americans.[1] Mail order retailing has grown from a cottage industry thirty years ago into a $200 billion per year enterprise today.[2] Part of this growth is due to the fact that out-of-state mail order retailers enjoy a considerable advantage over in-state retailers. Most out-of-state mail order retailers are not required to collect and remit the sales or use tax to either the state in which the retailer is physically located or the state in which the customer is located.[3]

For example, the typical mail order retailer operates in one state and has no physical presence in the forty-nine other states. It advertises by sending its catalogs nationwide and accepts orders over the phone or through the mail. Mail order retailers, under current Commerce Clause interpretation, cannot be compelled to collect any other state's use tax because the retailer does not have a "substantial nexus" with any state (aside from the one it operates in) to subject itself to any other state's sales or use taxing statutes. In contrast, the typical retailer operating in malls or other traditional retail outlets does not enjoy the same immunity from tax collection. The typical retailer, by virtue of its physical presence in the states in which it operates, must collect and remit the sales or use tax in accordance with various state and local statutes. Thus, a mail order retailer "operating" in only one state achieves a competitive advantage over retailers in forty-nine others.

The mail order retailer's advantage is significant in many ways. If a consumer has the option of choosing between two identically priced goods, one of which is offered for sale in a catalog and the other in a retail outlet, choosing the catalog good would save the consumer $100 on a $2000 purchase in a jurisdiction levying a use tax of 5%. In replacing the Articles of Confederation with the Constitution,

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1. In 1990, over 54% of Americans made a mail order purchase. *See* State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d. 203, 209 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992).

2. *See id.* In 1989, mail order sales accounted for $183 billion. This was roughly 75 times greater than in 1967. *Id.*

3. Most are familiar with a sales tax. It is a tax generally imposed on retail purchasers of goods (and sometimes services). Although it is imposed on purchasers, it is generally required to be collected by the seller and remitted to the state. A use tax is similar. It, too, is imposed on the purchaser. However, use taxes are generally imposed on the use of property within the jurisdiction. Many states avoid the problem of double taxation of the sale by allowing a credit on the use tax if a sales tax was paid. *See* Henneford v. Silas Mason Co., 300 U.S. 577 (1937). *See also* 2 CHESTER J. ANTIEAU, MODERN CONSTITUTIONAL LAW 124 (1969 & Supp. 1994).

the Framers intended to eliminate the problem of states discriminating against out-of-state businesses.[4] Ironically, it now seems as though out-of-state businesses receive some competitive advantage over in-state businesses.[5]

The mail order retailer's immunity from tax collection duties encourages consumers to purchase from the mail order retailer to "avoid the tax." Actually, consumers are not avoiding the tax as much as they are evading the tax because most states require consumers to remit a use tax to the state in which they live if they have purchased goods without paying a sales tax.[6] For budgetary reasons, state audit departments might claim it is impractical to attempt to enforce the use tax on individuals. Consequently, states are becoming more and more aggressive about requiring out-of-state mail order retailers to collect the use tax for them.[7]

There are, however, very good reasons in support of limiting states' abilities to force out-of-state retailers to collect their use taxes. First, as previously mentioned, the Framers were concerned with state protectionism and wanted to make sure that states were not penalizing out-of-state companies with burdensome regulations which would impede the flow of interstate commerce.[8] As a response to these concerns, the Framers incorporated the Commerce Clause into the Constitution.[9] Second, imagine how onerous it would be to require a retailer operating in one state to read, understand, and comply with the differing definitions, exemptions, and rates of the approximately 6500 taxing jurisdictions that exist throughout the United States.[10] Such a requirement would impose a significant burden on interstate commerce. Third, remember that the tax is not on the retailer, it is on the consumer. When the state is allowed to impose collection duties on retailers, it is shifting the large compliance burden on companies by forcing them to collect the tax on its behalf. In the case of most sales and use tax statutes, the state may simultaneously may seek payment of the tax from both the retailer and the consumer if it chooses. Therefore, if the retailer cannot be

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4. The Articles of Confederation were replaced by the Constitution for a variety of reasons. One very important reason, however, was that the states were engaging in destructive trade wars against each other. State and local governments were too responsive to local economic interests, often protecting those interests at the expense of non-local businesses and citizens. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 403-404 (2d. ed. 1988).

5. *See Henneford*, 300 U.S. at 586 (holding that a state may act to reduce this competitive advantage via taxation).

6. *See, e.g.*, IND. CODE §§ 6-2.5-3-2(a), -6 (1993); VA. CODE ANN. § 58.1-604 (Michie 1997). *See also generally* Michael C. Hamersley, *Will the* Bellas Hess *Physical Presence Requirement Continue to Protect Out-of-State Mail-Order Retailers from State Use Taxes in the* Quill *Era?* Quill Corp. v. North Dakota, 46 TAX LAW. 515, 515 & nn.4-6 (1993).

7. *See generally* W. Carl Spining, *Forcing Mail-Order Houses to Collect Use Taxes in the Wake of* Quill Corp. v. North Dakota, 60 TENN. L. REV. 1021 (1993) (arguing that the current constitutional interpretation that allows out-of-state retailers to avoid a state's use tax is unfair).

8. *See generally* THE FEDERALIST Nos. 7, 11 (Alexander Hamilton); TRIBE, *supra* note 4.

9. *Id.*

10. *See* Pamela M. Krill, Quill Corp. v. North Dakota*: Tax Nexus Under the Due Process and Commerce Clauses no Longer the Same*, 1993 WIS. L. REV. 1405, 1429 & n.149.

compelled to collect the tax because its nexus with the state is not sufficient, the state has not necessarily lost revenue from the transaction states can, and often do, collect the tax from the consumer.[11]

Today, it is clear that retailers who have no physical presence in a state cannot be compelled to collect that state's use tax.[12] It is equally clear that those retailers maintaining a continuous operation in a state can be compelled to collect that state's tax.[13] What is troublesome to retailers and state taxing authorities is the gray area in-between. How substantial must the business physical presence be in the taxing state? Will a certain number of trips to the taxing state constitute a sufficient nexus so that the state may impose collection duties on the retailers?

In *Quill Corp. v. North Dakota*,[14] the U.S. Supreme Court reaffirmed its long-standing rule that a "physical presence" was necessary for a state to impose the collection of use taxes.[15] Subsequently, in *Orvis Co. v. Tax Appeals Tribunal*,[16] the New York Court of Appeals interpreted the Court's physical presence requirement to mean that the presence must only be "demonstrably more than a slightest presence."[17]

This note examines the problem of imposing use tax collection on out-of-state mail order retailers in light of both *Quill* and *Orvis*. In an effort to understand the current state of the law, this Note summarizes the history of Supreme Court jurisprudence with regard to these problems. Second, this Note studies the majority and dissenting opinions in *Quill* and the standard they produced. Third, this note critically analyzes the *Orvis* decision and its reading of *Quill*. Finally, this Note concludes that state courts should not adopt New York's standard but, instead, interpret the plain language of the *Quill* opinion.

I. HISTORY OF LIMITS ON USE TAXATION OF OUT-OF-STATE RETAILERS

Understanding the history of sales and use tax jurisprudence is important, not only for the purpose of evaluating the *Orvis* court's reasoning and decision, but also for the dual purposes of evaluating the current status of sales and use tax jurisprudence and attempting to address its shortcomings. Historically, sales and use tax laws have been challenged when applied to out-of-state retailers on the basis that they violated both the Due Process and Commerce Clauses of the Constitution. Until *Quill*, the required nexus with the taxing state was similarly evaluated under both clauses. In *Quill*, however, the Supreme Court, for the first time, clearly distinguished between Due Process and Commerce Clause jurisprudence resulting in the latter largely subsuming the former as applied to the

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11. *See id.* at 1430-32 & nn.160-66.
12. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 301-302 (1992).
13. *See id.* at 317.
14. 504 U.S. 298 (1992).
15. *Id.* at 317.
16. 654 N.E.2d 954 (N.Y.), *cert. denied sub nom.* 116 S. Ct. 518 (1995).
17. *Id.* at 961.

states' abilities to impose collection of use taxes on out-of-state retailers.[18] Although Due Process Clause limitations are no longer a debatable issue, Commerce Clause limitations are still very controversial.[19]

Although there have been many use tax cases during the past century, in discussing the central mail order retailer problem, this Note focuses on those cases that define the limits on a state's power to force retailers to collect its use tax. The first case this Note examines is *National Bellas Hess, Inc. v. Department of Revenue*.[20] It held that some physical presence was necessary for a state to be able to require a retailer to collect its use tax.[21] In the thirty years since *Bellas Hess*, the Court has repeatedly held that one common factor in determining whether a given statute will pass Commerce Clause muster is that some physical presence has been required. Although state taxing authorities and legislatures have attempted to chip away at this requirement, the Court has continually reaffirmed its decision to require a physical presence to satisfy the Commerce Clause.

A. National Bellas Hess—*Physical Presence Required*

Bellas Hess was not the first case to strike down a state use tax statute on constitutional grounds, but it was a landmark case regarding mail order retailers. Bellas Hess was a major mail order retailer with net sales in 1961 of roughly $60 million, $2 million of which were to customers in the state of Illinois.[22] Bellas Hess' only contact with Illinois was through the U.S. mail and common carriers.[23] It regularly mailed catalogs, flyers, and other solicitations to customers throughout the United States.[24] However, Bellas Hess neither owned property in Illinois, nor did it have agents or salespersons located therein.[25]

The Supreme Court, in a 6-3 decision, struck down the Illinois statute as violative of federal constitutional limits on state taxation of interstate commerce.[26] The Court held that the Constitution requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to

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18. *See Quill*, 504 U.S. at 305. The Court stated, "Although the 'two claims are closely related,' the clauses pose distinct limits on the taxing powers of the States." *Id.* (quoting National Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 756 (1967)).

19. Commerce Clause limitations are controversial for two reasons. First, interpreting Supreme Court pronouncements is a source of contention between states and mail order retailers. Second, under the emergence of new technology and "virtual markets," where people can conduct business without leaving their homes, questions arise whether the "physical presence" distinction is appropriate given today's economic and technological realities.

20. 386 U.S. 753 (1967).

21. *See id.* at 758.

22. *See id.* at 760-61 (Fortas, J., dissenting).

23. *See id.* at 754.

24. *See id.*

25. *See id.*

26. *Id.* at 760.

tax."[27] After acknowledging situations in which the states may impose a tax on interstate commerce, the Court concluded that "[it] has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."[28]

The majority's chief rationale for invalidating the tax was that the burden it placed on interstate commerce was too high given that the company had not availed itself of the state's benefits:

> Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."[29]

The dissent, however, did not see the lack of a physical presence in Illinois as an obstacle to Illinois' attempts to impose the duty on Bellas Hess. The dissent relied heavily on the fact that Bellas Hess was a large multistate company that continuously solicited Illinois customers and used Illinois banking and credit institutions to generate income.[30] Justice Fortas believed these contacts were more than sufficient to allow Illinois to require Bellas Hess to collect and remit the use tax.[31] Despite the dissent, *Bellas Hess* is significant because the majority unequivocally required the vendor to have a physical presence in the taxing state before the state could impose on the vendor the duty to collect and remit its use tax.

B. National Geographic—*Slightest Presence Rebuked*

Ten years after *Bellas Hess*, the Supreme Court heard another use tax case.[32] In this case, California attempted to impose collection of its use tax on National Geographic Society's mail order business. The mail order business had no physical presence in California, but National Geographic had two related subsidiary

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27. *Id.* at 756 (quoting Miller Bros. v. Maryland, 347 U.S. 340, 344-45 (1954)).
28. *Id.* at 757-58.
29. *Id.* at 759-60 (footnotes omitted).
30. *See id.* at 761-62 (Fortas, J., dissenting).
31. *See id.* at 762.
32. National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977).

organizations maintaining offices in California.[33] National Geographic's mail order business sold globes, atlases, maps, and books through flyers, magazine advertisements, and other direct mail mechanisms.[34] Orders were sent to National Geographic's Washington D.C. offices, and the merchandise was shipped back to the purchaser without any direct solicitation or delivery in California by National Geographic employees or agents.[35] National Geographic's California offices solicited advertising for its magazine but did not perform any activities related to the mail order business.[36]

In upholding the constitutionality of the tax on National Geographic, "[t]he California Supreme Court concluded, based on its survey of the relevant decisions of this Court, that the 'slightest presence' of the seller in California established sufficient nexus between the State and the seller constitutionally to support the imposition of the duty to collect and pay the tax."[37] The U.S. Supreme Court also upheld the state's ability to tax National Geographic, but expressly rejected California's "slightest presence" test.[38] Instead, the Court upheld the constitutionality of this tax on the rationale that National Geographic's subsidiary organizations were similar to having agents[39] or retail outlets[40] in California, which the Court had previously held to be sufficient to defeat a Commerce Clause challenge on the basis of a lack of physical presence.[41] Although the Court upheld the constitutionality of the tax, it destroyed the notion that a "slightest presence" was sufficient to satisfy the nexus requirement.

II. *QUILL*—REAFFIRMANCE OF THE PHYSICAL PRESENCE REQUIREMENT

This section of the Note first recites the facts of this landmark case and describes the district court holding. It then critiques the North Dakota Supreme

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33. *See id.* at 552.

34. *See id.*

35. *See id.*

36. *See id.* During the audit period, National Geographic also used the offices to make negligible over-the-counter sales. Taxes were paid on these sales, totaling under $3000. *See id.* at 554 n.2. Both the California Supreme Court and the U.S. Supreme Court, however, found it "unnecessary to consider these sales in determining whether sufficient nexus was shown." *Id.*

37. *Id.* at 555.

38. *Id.* at 556. The Court stated, "Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus." *Id.*

39. *See generally* General Trading Co. v. Tax Comm'n, 322 U.S. 335 (1944) (The maintenance of agents in a jurisdiction creates a sufficient physical presence to satisfy the Commerce Clause nexus requirement.); Felt & Tarrant Trading Co. v. Gallagher, 306 U.S. 62 (1939). *See also In re* Scholastic Book Clubs, Inc. 920 F.2d 947, 958 (Kan. 1996).

40. *See generally* Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941); Nelson v. Montgomery Ward, 312 U.S. 373 (1941) (holding that retail outlets in a jurisdiction constitute a sufficient physical presence to satisfy the Commerce Clause nexus requirement).

41. *National Geographic*, 430 U.S. at 556-57.

Court's holding. Finally, it analyzes the U.S. Supreme Court's majority and minority opinions.

A. Facts and District Court Holding

Quill Corporation was a mail order company that sold office equipment and supplies. North Dakota attempted to impose collection of its use tax on Quill for its sales to customers in that state. Quill had offices and warehouses in Illinois, California, and Georgia; however, Quill's presence in North Dakota was entirely economic in nature.[42] Although Quill sold goods to North Dakota customers, it had no salespersons or other employees located in North Dakota and its "ownership of tangible property in that State [was] either insignificant or nonexistent."[43] Quill's only contact with North Dakota was via catalogs and flyers sent through the mail, and advertisements in periodicals, and through telephone calls with persons in North Dakota.[44] During the audit period, Quill annually sold approximately $200 million in goods across the United States and almost $1 million to roughly 3000 customers in North Dakota.[45] Quill delivered all of its merchandise to its North Dakota customers via mail or common carrier from out-of-state locations. Quill's relationship to North Dakota was much like that of Bellas Hess' to Illinois: neither company had a "physical presence" in the state that was attempting to force collection of its use tax on them.

Like Illinois and California in the previously discussed cases, North Dakota required its residents to pay a use tax on personal property purchased for storage, use, or consumption in the state.[46] Although the tax was technically levied on the consumer, North Dakota required all retailers maintaining a place of business in North Dakota to collect and remit the tax when such property was sold.[47] Quill was assessed the tax under the North Dakota statute because "maintaining a place

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42. Quill Corp. v. North Dakota, 504 U.S. 298, 301 (1992). Quill's presence was economic rather than physical because it had a market presence in North Dakota via its flyers, but had no physical presence in North Dakota. *See id.*

43. *Id.* at 302.

44. *See id.*

45. *See id.*

46. *See* N.D. CENT. CODE § 57-40.2-02.1(1) (1993). The relevant portion of the statute provides: "an excise tax is imposed on the storage, use, or consumption in this state of tangible personal property purchased at retail for storage, use or consumption in this state. . . ." *Id. See also* Roberta J. Loberg, *State Authority to Require Use Tax Collection from Direct Marketers:* Quill Corp. v. North Dakota, 26 CREIGHTON L. REV. 607, 609 & n.20 (1993).

47. N.D. CENT. CODE § 57-40.2-07(1) (1993). The relevant section of this statute provides:

> [E]very retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, . . . shall obtain a permit from the commissioner to collect the tax imposed by this chapter, . . . and at the time of making such sales, whether within or without the state, shall . . . collect the tax imposed by this chapter from the purchaser.

Id.

of business" in North Dakota included any person who distributes catalogs or otherwise advertises in North Dakota on a regular or systematic basis.[48]

Even though North Dakota acknowledged that Quill did not have a "physical presence" in the state as required by *Bellas Hess*,[49] North Dakota persisted in attempting to require Quill to collect its use tax. Quill protested, arguing that by requiring Quill to collect and remit the tax, North Dakota was violating the Fourteenth Amendment Due Process Clause and Commerce Clause because Quill lacked the required nexus with North Dakota.[50] The district court agreed with Quill and rejected the State's attempt to tax Quill.[51] The court, relying primarily on *Bellas Hess*, "held that the State had failed to establish a sufficient nexus between Quill and the State, and that . . . [the state's actions] were therefore unconstitutional as applied to Quill."[52]

B. The North Dakota Supreme Court Opinion

In spite of *Bellas Hess*, the North Dakota Supreme Court overruled the district court and found in favor of the State.[53] In doing so, that court rejected the U.S. Supreme Court mandate of requiring a physical presence to satisfy the Due Process and Commerce Clause nexus standards. The court, citing various North Dakota and U.S. Supreme Court cases for authority,[54] stated "[w]hile we necessarily begin our analysis in the context of the majority opinion in Bellas Hess, we are mindful that prior cases cannot be read in a vacuum, but must be considered in light of their relevant facts and historical context."[55] In discussing "obsolescent precedent" and its duty to consider cases "in light of their relevant facts and historical context," the court was laying the groundwork to reject a U.S. Supreme Court precedent.

Because the North Dakota Supreme Court was ultimately reversed by the U.S. Supreme Court,[56] its reasoning may seem insignificant. However, understanding the rationales and the weaknesses of the opinion is important in understanding the history of the mail order industry, its taxation, and the latest state challenge. It is in this light that the North Dakota Supreme Court opinion is analyzed.

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48. *Id.* § 57-40.2-01(7). The relevant portion of this statute provides: "'Retailer maintaining a place of business in this state' . . . . includes every person who engages in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising." *Id.*

49. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 758 (1967).

50. State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d. 203, 205 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992).

51. *Id.* (citing the unreported decision of the state trial court).

52. *Id.* at 205-06.

53. *Id.* at 204 (reversing the unreported decision of the state trial court).

54. *Id.* at 207-08. The court cited several cases in which they believed they had been "chided' by the U.S. Supreme Court for failing to overturn "obsolescent precedent." *Id.* at 208.

55. *Id.* at 207.

56. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).

The North Dakota Supreme Court used several rationales to justify its decision. Chief among them was that:

> [t]he economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists, save perhaps in the fertile imaginations of attorneys representing mail order interests. In the quarter-century which has passed in the interim, "mail order" has grown from a relatively inconsequential market niche into a Goliath now more accurately delineated as 'direct marketing.'[57]

This argument has gained popularity over the decades following *Bellas Hess*.[58] Indeed, the statements regarding the growth of mail order retailing are accurate.

The fact that an industry has grown from an inconsequential one to a "Goliath" should never mean, ipso facto, that the constitutional analysis surrounding the industry should change as well. The constitutional analysis of state regulation of an industry or entity is not related to whether the actor sought to be regulated is a "Goliath" or merely a "niche" industry. Nowhere in *Bellas Hess*, or any of the other cases regarding mail order retailers, did the Court say that if the industry was larger, it would have decided differently or that a different analysis would have been used. The argument properly belongs in a congressional forum, where there can be debate about what laws are necessary to regulate a burgeoning industry.[59] To suggest, however, that the growth in the industry is a valid reason for changing the constitutional analysis surrounding it is nonsensical.

North Dakota's next rationale has a similar weakness. The court stated, "The burgeoning technological advances of the 1970s and 1980s have created revolutionary communications abilities and marketing methods which were undreamed of in 1967."[60] The court noted how infomercials, "800" numbers, home shopping channels, and the like, have allowed mail order retailers to intrude into our lives.[61]

It continued by recognizing two other changes. First, "[p]erhaps the greatest change in mail order since 1967 has been in terms of sheer volume."[62] Second,

> [w]hile in 1967 it may have generally been necessary to rely upon in-state sales personnel and inventory to successfully market a product, technology has changed the rules of the game. Today a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer.[63]

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57. *Quill*, 470 N.W.2d. at 208.
58. *See infra* note 185.
59. *See generally* Krill, *supra* note 10. *See also* Hamersley, *supra* note 6.
60. *Quill*, 470 N.W.2d. at 208.
61. *See id.* at 208 n.4.
62. *Id.* at 209.
63. *Id.*

Although there have been significant technological advances in the past thirty years, what was discussed was not a revolutionary new technology, but rather the same business taking advantage of inevitable technological improvements. This was not a business created because of technology made available after 1967.[64] The court cites such advances as toll free 800 numbers and WATS lines as causing, or at least facilitating, the explosion in mail order retailing. However, these are not new technologies. They are merely pricing structures used by telephone companies. Telephone service and television advertising existed long before 1967. The principal means of advertising used by most mail order companies, direct mail advertising via catalogues and mailers, was both technologically available and in mainstream use in the United States in 1967.

The court made no attempt to square its decision with *Bellas Hess*. Rather, it concluded that *Bellas Hess* was outdated and therefore needed to be overturned.[65] In deciding the case, the court frequently spoke about the need to judicially "move ahead."[66] It stated, "We are guided by the maxim that '[w]hen the reason of a rule ceases so should the rule itself.'"[67] The court went on, quoting Justice Cardozo:

> There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.[68]

Although the court was correct in stating these general principles of common law decision making, it failed to mention the most important of all principles that a court, especially a lower court, is to follow when deciding a case in light of law previously promulgated by a higher court—stare decisis.[69]

C. The U.S. Supreme Court Opinion

The U.S. Supreme Court heard Quill's case in 1992. Although the mail order landscape had substantially changed since *Bellas Hess*, the Supreme Court upheld that case and overruled North Dakota's decision.[70] In so doing the Court established separate inquiries under the Due Process Clause and the Commerce Clause.[71] The Court held that "the Clauses pose distinct limits on the taxing

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64. 1967 is used as a reference year because that was the year *Bellas Hess* was decided.

65. *See Quill*, 470 N.W.2d at 208, 215.

66. *Id.* at 208.

67. *Id.* (quoting N.D. CENT. CODE § 31-11-05(1) (1993)).

68. *Id.* (quoting CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151 (1921)).

69. In the past, the Court has treated a lower court's attempts to evade the mandates of Court precedent rather roughly: "Needless to say, only this Court may overrule one of its precedents." Thurston Motor Lines, Inc. v. Jordan K Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam).

70. Quill Corp. v. North Dakota, 504 U.S. 298 (1992). *See also* Lawrence A. Jegen III, *Tax Tips: 'Out-of-State' Sellers and Use Tax Collection*, 35 RES GESTAE 268 (1991).

71. *See Quill*, 504 U.S. at 305-06 (citing International Harvester Co. v. Department of the

powers of the States. Accordingly, although a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause."[72] In applying the different standards to Quill, the Court concluded that North Dakota's tax did not violate the Due Process Clause, but did violate the Commerce Clause. The Due Process Clause was not violated because Quill, although not maintaining any physical presence, did have "sufficient minimum contacts" with North Dakota.[73] The Commerce Clause, however, was violated because Quill did not have a "substantial nexus" with the taxing state.[74]

1. The Different Standards.—The Court stressed that the two inquiries are distinct for two important reasons. First, they "reflect different constitutional concerns."[75] Second, "while Congress has plenary power to regulate commerce among the States and thus may authorize state actions which burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause."[76] Understanding the significance in the difference between the clauses is an important step in understanding why a tax may be imposed or struck down in the modern era of Due Process and Commerce Clause jurisprudence.

In analyzing the Court's reasoning, this Note turns to the assertion that the clauses reflect different constitutional concerns. Due process is concerned with "traditional notions of fair play and substantial justice."[77] It concerns "the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to justify the State's exercise of power over him."[78] In comparison, Commerce Clause analysis presumes jurisdiction has already been held appropriate. In addition, it "and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy."[79] Also, "[u]nder the Articles of Confederation, State taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills."[80]

Treasury, 322 U.S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part)).

72. *Id.* at 305 (citing Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue, 483 U.S. 232 (1987)).

73. *Id.* at 308. The Court held that for due process nexus, the relevant inquiry is "whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* at 307.

74. *Id.* at 311 (relying on Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), *Bellas Hess*, and *National Geographic* for the proposition that whether the entity to be taxed had a "substantial nexus" is the relevant inquiry for Commerce Clause nexus).

75. *Id.* at 305.

76. *Id.*

77. *Id.* at 307.

78. *Id.* at 312.

79. *Id.*

80. *Id.* (citing THE FEDERALIST, *supra* note 8).

Second, the Court asserted that although Congress has plenary power to regulate under the Commerce Clause, it has no such power under the Due Process Clause. This statement stands on its own, and it is doubtful that this assertion would be seriously questioned by any court. Although the negative implications of the Commerce Clause generally prevent states from unfairly taxing interstate commerce, there is nothing to prevent Congress from expressly allowing the states to do so, or alternatively, for Congress to tax the commerce or regulate more precise boundaries on when and how states may require retailers to collect their use taxes.[81]

2. Applying the Due Process Standard—Minimum Connection Required.— The *Quill* decision settled the due process issue with regard to imposition of the duty to collect and remit use tax on out-of-state retailers. All doubt about whether a physical presence in the taxing state was required was wiped away. All that is now required is some minimum connection between the state and the entity to be taxed.[82]

The Due Process Clause standard Justice Stevens espoused in *Quill* was that "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" was necessary.[83] The analogy between the State's power to tax Quill and its power to exercise personal jurisdiction over a defendant was made clear. Practically speaking, the simple act of conducting business in a state, whether in person, through the mails or common carrier, or over the phone, is sufficient to satisfy the due process nexus requirements.[84]

The Court supported its decision by stating that its due process jurisprudence had "evolved substantially" in the twenty-five years since *Bellas Hess*.[85] The Court continued by framing the relevant inquiry as "whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"[86] Instead of formally requiring a defendant's presence within a state, due process jurisprudence should hinge on "whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State."[87] Essentially, if a company sells a product or service to a customer in a given state, the Due Process Clause will not prohibit that state

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81. *See The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 163 n.10. (1992).

82. *See Quill*, 504 U.S. at 306-08.

83. *Id.* at 306.

84. *See id.* at 308.

85. *See id.* at 307.

86. *Id.* (quoting International Shoe v. Washington, 326 U.S. 310 (1945)).

87. *Id.* at 307. The Court's modern jurisdiction analysis, as evidenced by cases such as *International Shoe v. Washington*, 326 U.S. 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) was finally applied to a state's power to impose use tax collection duties on an out-of-state entity with no physical presence in the taxing state in *Quill*, bringing sales and use tax due process nexus in line with "normal" jurisdictional nexus. *Id.*

from exercising personal jurisdiction over the company and imposing taxes. The state's ability to impose the duty to collect the tax will, of course, be subject to other constitutional concerns.[88]

3. Applying the Commerce Clause Standard—Substantial Nexus Required.—Unfortunately, resolution of the Commerce Clause nexus issue was not as clear as it was for the due process nexus issue. Although the Court explicitly held that a physical presence in the taxing state was necessary, exactly how much of a presence was needed to satisfy the Commerce Clause was left unaddressed by the Court. The standard adopted by the Court, or rather reinforced, was that an activity with "substantial nexus" to the taxing state was required.[89] This section of the note analyzes why the majority upheld *Bellas Hess* and then turns to Justice White's dissent to discuss the reasons why *Bellas Hess* should have been overruled.

a. The majority opinion.—The majority overruled the North Dakota Supreme Court for the following reasons: (1) the Dormant Commerce Clause prohibits the taxation at issue; (2) *Bellas Hess* is not obsolete; (3) the Commerce Clause nexus requires a higher standard than due process nexus; (4) the benefits of the bright-line "physical presence" rule warrant the physical presence standard; and (5) Congress, if it disagreed, could simply change the standard.[90] The Court began by saying "the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. The Clause, in Justice Stone's phrasing, 'by its own force' prohibits certain state actions that interfere with interstate commerce."[91] The Court discussed its own history of Dormant Commerce Clause jurisprudence, much of which has been summarized above.[92]

Second, the Court rejected the North Dakota Supreme Court's assertion that *Complete Auto Transit v. Brady*[93] rendered *Bellas Hess* obsolete.[94] In *Complete Auto*, Mississippi attempted to assert its gross income tax on Complete Auto Transit, a Michigan corporation engaged in the business of transporting vehicles

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88. Although the Due Process Clause is generally not an obstacle to determining nexus, it may prohibit other "fundamental fairness" violations such as attempts by a state to subject a company to unfair "cumulative taxation." *See generally* Oklahoma Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995). *See also* Goldberg v. Sweet, 488 U.S. 252 (1989).

89. *See Quill*, 504 U.S. at 311. This standard is not new. *Quill* essentially affirmed the standard set out in a franchise tax nexus case, *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977).

90. *See Quill*, 504 U.S. at 309-20.

91. *Id.* at 309. The Court is describing the "negative" or "dormant" Commerce Clause. It is commonly understood that where Congress acts, regulating interstate commerce, the states may not act in contravention of Congress. Also, where Congress has failed to act, as here, the Court often interprets this as "negative" action, also restricting state activity in the interstate commerce area. *See* TRIBE, *supra* note 4, at 404; *The Supreme Court*, *supra* note 81.

92. *See Quill*, 504 U.S. at 309.

93. 430 U.S. 274 (1977).

94. *Quill*, 504 U.S. at 310. *See also Complete Auto*, 430 U.S. at 279.

by motor carrier for General Motors.[95] Complete Auto Transit transported vehicles to dealers in Mississippi.[96] The Supreme Court upheld Mississippi's ability to tax Complete Auto Transit. In its decision, the Court set out a four prong test to use in evaluating a Commerce Clause challenge to a state's tax. The test is satisfied if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[97] Because the Supreme Court phrased this test in the conjunctive, not the disjunctive, each of these four prongs must be satisfied by a state attempting to impose a tax on an out-of-state entity.

North Dakota held that this new test rendered *Bellas Hess* obsolete.[98] The U.S. Supreme Court disagreed, saying that *Complete Auto* did not automatically overrule *Bellas Hess* and that three weeks after deciding *Complete Auto*, *Bellas Hess* was cited in *National Geographic* for the proposition that "a vendor whose only contacts with the taxing state are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."[99]

Third, the Court discussed the Due Process and Commerce Clauses, their respective standards, and the reasons why the Commerce Clause nexus standard is higher than the due process nexus standard. After discussing why the standards are different,[100] the Court reviewed the origins of the Commerce Clause in the context of why it was included in the Constitution.[101] The Framers intended the Commerce Clause as a cure to the states' protectionist practices under the Articles of Confederation.[102] Accordingly, the Court reasoned, "we have ruled that [the] clause prohibits discrimination against interstate commerce . . . and bars state regulations that unduly burden interstate commerce . . . ."[103] The Court's statements, in upholding *Bellas Hess* on Commerce Clause grounds, tacitly implied that the lack of a physical presence in a taxing state makes the regulation of that entity "unduly burdensome" on interstate commerce and therefore in violation of the Commerce Clause.

Fourth, the Court attacked North Dakota's assertion that *Bellas Hess* had been rendered obsolete by the evolution of the Court's Due Process and Commerce Clause jurisprudence. The Court said, "Although we agree with the state court's assessment of the evolution of our cases, we do not share its conclusion that this evolution indicates that the Commerce Clause ruling of *Bellas Hess* is no longer

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95. *Complete Auto*, 430 U.S. at 276.

96. *See id.*

97. *Id.* at 279.

98. State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d 203, 214 (N.D. 1991), *rev'd*, 504 U.S. 298 (1992).

99. *Quill*, 504 U.S. at 311.

100. *See id.* at 312.

101. *See id. See also* THE FEDERALIST, *supra* note 8.

102. *Quill*, 504 U.S. at 312.

103. *Id.* (citing Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Philadelphia v. New Jersey, 437 U.S. 617 (1978)).

good law."[104] Although the North Dakota Supreme Court concluded that *Bellas Hess* died with the Court's shift away from formalistic tests used in the era of *Bellas Hess*, the Supreme Court reaffirmed the "bright-line" rule promulgated by *Bellas Hess*.[105] The Court stated, "We have never intimated a desire to reject all established 'bright line' tests."[106] The Court then gave several reasons for retaining the rule. First, a bright-line rule "encourages settled expectations and, in doing so, fosters investment by businesses and individuals."[107] Second, *Bellas Hess* has "engendered substantial reliance [on the part of businesses] and has become part of the basic framework of a sizable industry."[108] Third, the doctrine of stare decisis underscores the importance of the "interest in stability and orderly development of the law."[109]

Finally, the majority opinion relied heavily on Congress' ability to overturn its Commerce Clause holding. The Court said, "No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions."[110] This indicates that Congress is free to pass legislation allowing states to tax transactions without requiring any physical presence.

b. Justice White's dissent.—Justice White, in the only dissenting opinion, attacked the majority for upholding *Bellas Hess*.[111] He agreed with the due process holding but did not agree that the Commerce Clause held states to a higher nexus standard.[112] His central disagreement stemmed from his understanding that *Bellas Hess* meant that "interstate commerce is immune from state taxation."[113] This concept, argued White, was overruled by *Complete Auto*. White further cited

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104. *Quill*, 504 U.S. at 314.

105. *See id.*

106. *Id.*

107. *Id.* at 316.

108. *Id.* at 317.

109. *Id.*

110. *Id.* at 318. In 1959, Congress reacted to a similar uncertainty in the income tax nexus area by enacting Pub. L. No. 86-272, 73 Stat. 555 (1959) (codified as amended at 15 U.S.C. § 381 (1994)). This legislation defined the nexus standard for state income tax purposes. Congress has not yet passed similar legislation in the sales and use tax area. *See generally* Brian S. Gillman, Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*: A Step out of the Definitional Quagmire of Section 381?*, 78 IOWA L. REV. 1169 (1993).

111. *Quill*, 504 U.S. at 322-23 (White, J., dissenting) (citing PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 10.8 (1981); Paul J. Hartman, *Collection of Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1006-15 (1986); W. Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 VAND. L. REV. 961, 984-85 (1986); Sandra B. McCray, *Overturning* Bellas Hess*: Due Process Considerations*, 1985 B.Y.U. L. REV. 265, 288-90; Charles Rothfeld, *Mail Order Sales and State Jurisdiction to Tax*, 53 TAX NOTES 1405, 1414-18 (1991) to support his conclusion that *Bellas Hess* should have been overruled).

112. *See id.* at 321-22.

113. *Id.* at 323.

National Geographic for the proposition that *Bellas Hess* was overruled because the Supreme Court, in *National Geographic*, held that states could impose the collection duties on out-of-state mail order businesses.[114] Although interstate commerce is no longer immune from state taxation, *Bellas Hess* did not assert such a proposition.[115] Rather, it held that an entity who had no physical presence in the taxing state could not be compelled to collect the state's use tax.[116] That is not to say that transactions or companies engaged in interstate commerce were immune from state taxation.

Additionally, in comparing *Quill* to *Bellas Hess* and *National Geographic*, White concluded that *National Geographic* overruled *Bellas Hess*, that *Quill* should be analyzed under the light of *National Geographic*, and that therefore the state should have been able to tax Quill. The biggest distinction between that facts in *Quill* and *Bellas Hess* and those in *National Geographic* was that neither Quill nor Bellas Hess had any appreciable physical presence in the taxing state. Conversely, National Geographic had a substantial, permanent, physical presence in California. Although its presence was not directly related to the mail order business, there was, nevertheless, a physical presence.

White also maintained that *Complete Auto* overruled *Bellas Hess*.[117] *Complete Auto* may be read to mean that an interstate transaction is not automatically granted immunity from state taxation. As mentioned, *Complete Auto* has four prongs that must be met before a tax on interstate commerce will be upheld.[118] One of those prongs requires the tax to be applied to an activity with "substantial nexus" in the taxing state. This language does not prohibit the state from enforcing its tax on interstate commerce, but rather from enforcing it against an entity that has no "substantial nexus" with the taxing state. As the majority suggests, *Complete Auto* can not be read to have overruled *Bellas Hess*, but rather to have continued the distinction between entities with some physical presence; for example, those with a physical presence, like National Geographic, and those without any physical presence, like Quill and Bellas Hess.

Finally, White attacks the majority opinion regarding the physical presence requirement for "perpetuating a rule that creates an interstate tax shelter for one form of business—mail order sellers—but no countervailing advantage for its competitors."[119] This is probably the best argument in favor of requiring out-of-state retailers to collect the tax at the bequest of the taxing state.

White's argument, however, is not immune from criticism. First, the tax is not on the business; it is on the consumer. The state is only trying to make its collection job *easier* by requiring commerce to collect the tax rather than having to collect from the consumer. The question arises: Why should businesses with no physical presence in a given state be coerced into complying with burden of

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114. *See id.* at 323-24.
115. *See id.*
116. *See* discussion *supra* Part I.A.
117. *See Quill*, 504 U.S. at 322-23 (White, J., dissenting).
118. *See supra* note 97 and accompanying text.
119. *Quill*, 504 U.S. at 329 (White, J., dissenting).

collection taxes on behalf of the state taxing authorities? The administrative burden on those companies would be enormous. Second, even if the states cannot compel out-of-state retailers to collect their use taxes, the states may (and many do) collect the tax directly from individual citizens of their state.[120]

c. Summary of the Commerce Clause holding.—Two important points are demonstrated by *Quill.* First, "substantial nexus" remains undefined. The Court never addressed its meaning. Second, the Court invited Congress to resolve this dispute in their opinion by enacting legislation.[121] To date, Congress has not taken action to remedy the situation.

Quill's chief weakness was that it did not adequately define the Commerce Clause nexus standard.[122] "Substantial nexus" is too vague to function as a bright-line rule. The Court unequivocally stated that the bright-line test was important, but did little to state what or where the bright-line was.[123] In order to more accurately characterize the line, this section reviews the holdings of the major cases. First, physical presence of some sort is a necessity. The Court went out of its way to uphold *Bellas Hess'* physical presence requirement.[124] Second, the standard is not the "slightest presence." This language was explicitly rebuked in *National Geographic.*[125] The questions then are, "How much of a physical presence equals a substantial nexus?" Is it a "substantial physical presence," or merely more than a "slightest presence"? Is the substantial nexus standard really a bright-line test? These questions were raised in *Orvis* and will continue to play an important role in the ongoing battle between states and mail order retailers until more specific direction is comes from the Supreme Court.

An alternative remedy would have been for Congress to legislate the standard it deemed appropriate.[126] Congress, however, took no action in the wake of *Quill.* Predictably, this issue would again be litigated between businesses and state taxing authorities. In 1995, the most recent challenge to a state's power to require out-of-state retailers to collect its use tax was brought before the New York Court of Appeals. The State of New York audited two Vermont businesses, Orvis Co. and

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120. When a retailer has "substantial nexus" with the taxing state, the state may choose from whom to collect the tax. If the business mistakenly believes it does not have "substantial nexus" and therefore does not collect the state's taxes, the individual is responsible for the tax. Additionally, if the state can convince a court that the entity had "substantial nexus," the retailer is also responsible for the tax. This permits the state to "double dip" by collecting the tax from both taxpayers.

121. *See generally* Gillman, *supra* note 110.

122. One compelling argument that *Quill* was not specific enough for the states and the retailers is that *Orvis* was appealed to the Supreme Court three years after *Quill* was handed down. *See infra* note 153 and accompanying text.

123. *See Quill*, 504 U.S. at 314-15.

124. *See id.* at 314.

125. *See* National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 556 (1977).

126. *See* Loberg, *supra* note 46, at 635 & n.297 (citing Amicus Curiae Brief for the Direct Marketing Ass'n in support of Quill Corp.).

Vermont Information Processing (VIP), and assessed them for failing to collect and remit use tax on sales to New York customers. The New York Court of Appeals, in a controversial opinion, upheld the constitutionality of the statute as applied to these taxpayers.[127] The decision was appealed to the U.S. Supreme Court and, equally surprising, the Court denied certiorari on November 30, 1995.[128]

III. Analysis of New York's Position

The *Orvis* case presents interesting factual scenarios that do not fit neatly into the fact scenarios of earlier cases like *Quill*, *Bellas Hess*, and *National Geographic*. This section first presents the facts and the court's holding as applied to those facts. Then, this section analyzes the court's rationale in arriving at its decision.

A. Facts and Holding

Orvis and VIP were both headquartered in Vermont with no rentals, property, or salespersons located in New York.[129] Their case presented an important and interesting problem because the facts of the case fall within that gray area between the "slightest presence" that insulates retailers from a state's use tax imposition and that solid, continuing "physical presence" that subjects one to a state authority's use tax collection power.

During the audit period, Orvis' annual sales to New York customers, both wholesale and retail, were between $1 million and $1.5 million.[130] There was conflicting evidence as to the number of times and for what purposes Orvis' salespersons entered New York. In an unsworn letter responding to a request for information, Orvis' treasurer stated, "Some salesmen who reside in Vermont travel into New York to call on non-Orvis owned stores."[131] Later, in an affidavit, Orvis' president asserted that they entered New York twelve times for the purpose, not of making sales calls, "but only to discuss problems such as concerning shipping and to check on how Orvis products were displayed."[132] The court, however, concluded that there was evidence "that Orvis' substantial wholesale business in this State was generally accomplished by means of its sales personnel's direct solicitation of retailers through visits to their stores in New York, subject only to approval of all orders in Vermont."[133] Also, the Tax Tribunal claimed that "the affidavits of Orvis' officers described the trips to New York of Orvis personnel as

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127. Orvis Co. v. Tax Appeals Tribunal, 654 N.E.2d 954 (N.Y. 1995), *cert. denied sub nom.* 116 S. Ct. 518 (1995). *See also* Brown's Furniture, Inc. v. Wagner, 665 N.E.2d 795 (Ill. 1996).

128. Vermont Info. Processing, Inc. v. Commissioner of N.Y. Dep't of Taxation & Fin., 116 S. Ct. 518 (1995) (mem.).

129. *Orvis*, 654 N.E.2d at 955.

130. *Id.* at 961.

131. *Id.*

132. *Id.*

133. *Id.*

'in a loop,' suggesting systematic visitation to all of its as many as 19 wholesale customers on the average of four times a year."[134]

Vermont Information Processing similarly had no property, rentals, or salespersons located within New York. Evidence of VIP's visits to New York was equally unclear. According to the court, VIP's "president testified that it is not [VIP's] ordinary practice to travel to its customers' places of business, and that on-site visits are only made to approximately 5% of [VIP's] customers for the purpose of correcting persistent or difficult problems, or occasionally to install software or train employees."[135] The court noted:

> Evidence was submitted from which the Tribunal could reasonably infer that VIP's hardware and software sales agreements obligated it to provide a charge-free visit of a VIP computer software installer at its beverage-distributor customer's site in New York if problems necessitating the visit occurred within the first 60 days of installation. Moreover, VIP's invoices showed charges for travel expenses to its New York customers' locations on 41 occasions . . . during the three-year audit period, in which VIP had 154 taxable transactions in New York.[136]

If each of these visits related to a different transaction, slightly more than one-quarter of VIP's transactions with New York customers involved a visit to New York. If VIP's president is to be believed, most transactions resulted in no visits and the remaining transactions resulted in multiple site visits to fix the problem. In any event, it is unclear whether the forty-one visits were separate trips or whether two or more employees may have traveled together making the actual customer visits appear lower in number.

New York audited both companies in order to impose on them the duty to collect and remit use tax. Orvis was audited between September 1977 and August 1980,[137] and VIP was audited between December 1983 and November 1986.[138] The Tax Tribunal's proposed audit adjustments after all administrative hearings was $223,559 for Orvis[139] and $73,275 for VIP,[140] net of interest and penalties. In *Orvis*, the New York Supreme Court, Appellate Division held that Orvis' "sporadic activities in New York do not satisfy the 'substantial nexus' requirement articulated in *Quill* . . . ."[141] In *Vermont Information*, the court similarly found for VIP, holding that the company had adequately demonstrated it had no "substantial

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134. *Id.* at 962.

135. Vermont Info. Processing, Inc. v. Tax Appeals Tribunal, 615 N.Y.S.2d 99, 100 (N.Y. App. Div. 1994), *aff'd as modified sub nom.* 654 N.E.2d 954 (N.Y. 1995).

136. *Orvis*, 654 N.E.2d at 962.

137. Orvis Co. v. Tax Appeals Tribunal, 612 N.Y.S.2d 503, 505 (N.Y. App. Div. 1994), *aff'd as modified*, 654 N.E.2d 954 (N.Y. 1995).

138. *Vermont Info. Processing*, 615 N.Y.S.2d at 99.

139. *Orvis*, 612 N.Y.S.2d at 504.

140. *Vermont Info. Processing*, 615 N.Y.S.2d at 100.

141. *Orvis*, 612 N.Y.S.2d at 506.

'physical presence' within New York."[142]

The New York State Commissioner of Taxation and Finance appealed both the judgments which struck down New York's use tax statute as it applied to the two companies.[143] The New York Court of Appeals reversed the appellate division, holding that *Quill* did not require a substantial physical presence but only "demonstrably more than a 'slightest presence'" to satisfy the Commerce Clause nexus requirement.[144] The majority opinion criticized the lower court for applying a standard requiring "substantial physical presence."[145] After stating that "substantial physical presence" was not required, the opinion spent several pages discussing *Quill*, "considering the case in the context of its position in the evolution of Supreme Court doctrine limiting the authority of a state to assess or impose a duty to collect taxes arising out of the economic activity of a foreign business engaged in interstate commerce."[146] Supreme Court cases preceding *Bellas Hess* were discussed from the perspective that the test used by the Court was: if the tax was a "direct" tax on interstate commerce, the Court would prohibit the tax,[147] but if it was indirect, the Court would uphold it.[148] *Complete Auto*, however, replaced this standard with the four pronged test that is valid today.[149] The New York court, after briefly discussing *National Geographic*, turned to *Quill*.[150]

Unlike the North Dakota Supreme Court in *Quill* where the bulk of the opinion was spent supporting the conclusion that *Bellas Hess* was obsolete, the New York court did not attempt to distinguish *Quill* or to say that *Quill* was outdated. To the contrary, it embraced *Quill*. The court examined all the cases preceding *Quill,* looked at *Quill* itself, and decided that *Quill's* bright-line test mandated a standard of substantial nexus that allowed state use tax collection imposition on any retailer whose activities were "demonstrably more than a 'slightest presence'" in the taxing state.[151] It then concluded that the Administrative Law Judge could have found that this standard was met in each case (Orvis and VIP) and the court found for the state.[152]

The U.S. Supreme Court denied certiorari of this case and will not hear the

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142. *Vermont Info. Processing*, 615 N.Y.S.2d at 101.

143. *Orvis*, 654 N.E.2d at 955.

144. *Vermont Info. Processing* was reversed; *Orvis* was remitted. *See id.* at 960-61.

145. *Id.* at 956.

146. *Id.*

147. *See, e.g.*, Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951); Freeman v. Hewitt, 329 U.S. 249 (1946). *But see* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (overruling the direct v. indirect standard).

148. *See Complete Auto*, 430 U.S. at 274.

149. *See* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 183 (1995) (citing *Complete Auto's* four pronged test with approval).

150. *Orvis*, 654 N.E.2d at 958.

151. *Id.* at 961.

152. *See id.* at 961-62.

arguments set forth above by the New York Court of Appeals.[153] Undoubtedly, other states will now step up their efforts to bring out-of-state retailers within their taxing jurisdiction, making the Supreme Court's reasoning and physical presence standard all the more important to understand.

B. Analysis of Orvis

The New York court concluded that the Supreme Court's "substantial nexus" requirement for Commerce Clause nexus was intended to be satisfied by that level of physical presence that is "demonstrably more than a slightest presence."[154] In so deciding, the court supported its decision in four ways. First, it relied on the Supreme Court's apparent reluctance to uphold *Bellas Hess*. Second, it supported its decision with two reasons the Supreme Court gave for requiring a physical presence in *Quill*. Third, it concluded that *Quill's* bright-line mandate could only be fulfilled by its own *Orvis* standard. Fourth, it read *National Geographic* to mean that the physical presence need only be "demonstrably more than a 'slightest presence.'"

1. The Supreme Court's Apparent Reluctance to Uphold Bellas Hess.—Orvis appeared to rely on *Quill's* reluctance to uphold *Bellas Hess* as a reason to use a "lower" standard of physical presence, rejecting the taxpayers' assertion that a "substantial physical presence" was necessary. In so doing, the *Orvis* court quoted the only three places in *Quill* where the Supreme Court hinted at being reluctant to require a *Bellas Hess*-type standard physical presence. The first such statement was "[h]aving granted certiorari . . . we must either reverse the State Supreme Court or overrule *Bellas Hess*. While we agree with much of the State Court's reasoning, we take the former course."[155] The second was "[w]hile contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto*."[156] Finally, the third was "[a]lthough we agree with the state court's assessment of the evolution of our cases, we do not share its conclusion that this evolution indicates that the Commerce Clause ruling of *Bellas Hess* is no longer

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153. *See* Vermont Info. Processing, Inc. v. Commissioner of N.Y. Dep't of Taxation & Fin., 116 S. Ct. 518 (1995) (mem.). Unfortunately, we will not know what the Supreme Court thinks of the *Orvis* court's analysis of *Quill*. Nor will we know whether the Supreme Court would have adopted the "demonstrably more than the slightest presence" test, the "substantial physical presence" test, or some test in between. Although many states will undoubtedly interpret the Supreme Court's denial as a signal of approval, there are, as with every denial of certiorari, several plausible readings of the denial. One, as previously stated, is that the Court agrees that the standard should only be demonstrably more than the slightest presence and that it believes that Orvis and VIP factually exceeded those thresholds with their visits to New York. Another is that the Supreme Court disagrees with the standard, but thinks the activity, viewed in the light most favorable to the state, meets their "physical presence" standard of "substantial nexus."

154. *Orvis*, 654 N.E.2d at 961.

155. *Id.* at 958 (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 301-02 (1992)).

156. *Id.* at 959 (quoting *Quill*, 504 U.S. at 311).

good law."[157]

These statements were certainly more than passing comments within the Supreme Court's opinion. They were not, however, the crux of the opinion, nor did they imply that the only reason, or even the most important reason, the court upheld *Bellas Hess*, a twenty-five year old case, was that it was bound by stare decisis. It is telling, however, that the *Orvis* majority felt compelled to quote this language to support its opinion that only a nominal presence was required to satisfy the Commerce Clause nexus requirement. These quotations, especially the first two, may be reasons to strike any physical presence requirement from the test, but because *Quill* went out of its way to uphold the *Bellas Hess* physical presence requirement, reliance on the statements seems tenuous at best.[158]

2. *Quill's Reasons for Requiring a Physical Presence.*—According to the *Orvis* court, *Quill* only upheld the *Bellas Hess* physical presence requirement for two reasons.[159] First, the *Orvis* court said *Quill* retained the bright-line rule because it "benefits national commerce by avoiding the litigation-provoking controversy and confusion of imprecise constitutional standards, and fosters investment by settling expectations."[160] Second, the court said *Quill* upheld *Bellas Hess* because doing so satisfied stare decisis:[161] "[t]he *Bellas Hess* rule has engendered substantial reliance and has become part of a basic framework of a sizable industry. The 'interest in stability and orderly development of the law' that undergirds the doctrine of stare decisis . . . therefore counsels adherence to settled precedent."[162]

This characterization of *Quill's* rationale for retaining a physical presence test makes it much easier to find that only a nominal presence "demonstrably more than a slightest presence" should be required to satisfy the Commerce Clause nexus requirement. This characterization, however, is incomplete. The New York Court of Appeals omitted several rationales that *Quill* used in requiring a "physical presence" in the taxing state for the state to impose collection of its use tax.

First, *Orvis* said nothing about *Quill's* "other" rationale for using a bright-line test—that of limiting state governments.[163] The Court reasoned a bright-line test is preferable because

> [s]uch a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves

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157. *Id.* (quoting *Quill*, 504 U.S. at 314).

158. *See* discussion *supra* Part II.C.3.a. The *Quill* Court recited several reasons for upholding *Bellas Hess*.

159. *Orvis*, 654 N.E.2d at 959.

160. *Id.* (citing *Quill*, 504 U.S. at 315).

161. *Id.* (citing *Quill*, 504 U.S. at 317).

162. *Id.* (quoting *Quill*, 504 U.S. at 317).

163. *See Quill*, 504 U.S. at 315.

> much room for controversy and confusion and little in the way of precise guides to the States in the exercise of the indispensable power of taxation."[164]

This does not contradict *Orvis'* reasoning (support for which followed this quote in the *Quill* opinion) but is important because it emphasized that the Court desired the bright-line rule because it worked to constrain the states in their desire to tax out-of-state retailers.

Second, the New York court completely omitted any mention of the policy reasons *Quill* gave supporting the Commerce Clause's restrictions on a state's ability to tax interstate commerce. One of the Supreme Court's rationales for restricting a state's ability to impose the duty on retailers without substantial nexus has been that to do so unduly burdens interstate commerce.[165] The Court stated that "[u]ndue burdens on interstate commerce may be avoided . . . by the demarcation of a discrete realm of commercial activity that is free from interstate taxation."[166] This policy reason is not an idle, passing thought in the U.S. Supreme Court's opinion, but rather is one of the central reasons the Constitution was chosen to replace the Articles of Confederation and a central policy reason throughout the history of Commerce Clause jurisprudence.[167] Although the New York court recognized that the Supreme Court has cited this policy in *Quill* and *Jefferson Lines*,[168] it wholly ignored the possibility that *Quill* relied on this policy in upholding *Bellas Hess* and limiting states to taxing entities with a physical presence.

Third, the New York opinion makes no mention of the so-called Dormant Commerce Clause in analyzing why the *Quill* Court felt that *Bellas Hess'* physical presence requirement should be upheld. In ignoring the Dormant Commerce Clause, *Orvis* undermines *Quill's* holding because the Supreme Court concluded that a physical presence was required and that if Congress desired to lessen the standard, they could simply legislate it away.[169]

Once the New York Court of Appeals concluded that (1) *Quill* only reluctantly upheld *Bellas Hess'* physical presence requirement and only made it more than the "slightest" presence and (2) upheld it only because it was a bright-line test and

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164. *Id.* at 315-16 (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1959)).

165. *See id.* at 314-15. *See also* THE FEDERALIST, *supra* note 8.

166. *Quill*, 504 U.S. at 314-15.

167. *See* THE FEDERALIST, *supra* note 8.

168. Orvis Co. v. Tax Appeals Tribunal, 654 N.E.2d 954, 956, *cert. denied sub nom.* 116 S. Ct. 518 (1995).

169. *See Quill,* 504 U.S. at 316 & n.9 (discussing Congress' legislation regarding income tax nexus, 15 U.S.C. § 381 (1994)). Significantly, if the Court looked to Congress' actions on this separate but related subject, the test for income tax nexus appears more stringent than that for sales and use tax. The relevant portion of the statute states: "a State may not impose a net income tax on any person if that person's 'only business activities within such State [involve] the solicitation of orders [approved] outside the State [and] filled . . . outside the State.'" *Id.*

stare decisis required it, deciding against the taxpayers became a relatively simple task. The *Orvis* court used the broadest standard that did not directly contradict the U.S. Supreme Court, holding that the physical presence test meant "demonstrating more than a slightest presence." The *Orvis* court then found that the contracts which both Orvis and VIP had within New York, when taken in the light most favorable to the state, were substantial enough to meet that test.

3. Is New York's Standard the Only One That Fulfills Quill's *Intent?*—The New York Court of Appeals concluded that its standard, "demonstrably more than a slightest presence," was the only standard that could fulfill *Quill's* bright-line rule mandate.[170] It expressly rejected any reading of *Quill* that would "elevate" the standard to a "substantial physical presence."[171] The majority supported its decision with questionable readings of the Supreme Court's opinions in *Quill* and *Oklahoma Tax Commission v. Jefferson Lines, Inc.*

First, it said "*Quill* simply cannot be read as equating a substantial physical presence of the vendor in the taxing State with the substantial nexus prong of the *Complete Auto* test, as the Appellate Division's interpretation would require."[172] Although this may have been the Supreme Court's intent, it is hardly a forgone conclusion. Nowhere in *Quill* did the Supreme Court refute or embrace that terminology; the Court never even mentioned it.

Next, it concluded that acceptance of the standard of "substantial physical presence" would "destroy the bright-line rule the Supreme Court in *Quill* thought it was preserving in declining completely to overrule *Bellas Hess*."[173] The New York court argued that the adoption of that standard would "[i]nevitably . . . require a 'case-by-case evaluation of the actual burdens imposed' on the individual vendor involving a weighing of factors such as number of local visits, size of local sales offices, intensity of direct solicitations, etc., rather than the clear-cut line of demarcation the Supreme Court sought to keep intact by its decision in *Quill*."[174] In so stating, the court has implied that its interpretation does not require a case-by-case analysis. There are two major problems with the reasoning New York used to reach this conclusion. First, despite its conclusion to the contrary, New York's standard obviously invites a "case-by-case" analysis. Second, New York relies on *Jefferson Lines* for support of a proposition not at issue in that case.[175]

New York first alleged that the lower court's "substantial physical presence" requirement interpretation would destroy *Bellas Hess'* bright-line rule by requiring a "case-by-case" analysis and therefore should be rejected. Although a "substantial physical presence" standard invites a case-by-case analysis, so does almost any interpretation of phrase "substantial nexus." In declaring the standard to be "demonstrably more than a slightest presence," the court is still permitting reasonable minds to differ about what level of activity is "demonstrably" more

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170. *Orvis*, 654 N.E.2d at 960.
171. *Id.*
172. *Id.* at 959.
173. *Id.* at 960.
174. *Id.* (quoting *Quill*, 504 U.S. at 315).
175. *See* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

than a slightest presence and what level of activity constitutes only the "slightest presence." By its very nature, the Supreme Court's refusal to further define the standard of "substantial nexus" engenders a discussion of what activity is "substantial" enough to satisfy the nexus requirement.

Second, the New York court relies on the most recent Supreme Court case in the sales and use tax area, *Jefferson Lines*, to undermine *Quill's* adherence to the physical presence requirement. The New York court said

> [f]inally, confirmation that the Supreme Court never intended to elevate the nexus requirement to a substantial physical presence of the vendor can be found in [*Jefferson Lines*] . . . . In that case, the Court did not apply a substantial physical presence test, but instead strictly utilized the substantial nexus prong of the *Complete Auto* test without even passing reference to the substantiality of the physical presence of the vendor (an interstate bus company) in the taxing State.[176]

There is an excellent reason that the physical presence of *Jefferson Lines* was not given even a "passing reference" by the Supreme Court. Jefferson Lines' physical presence was not in dispute. Even a cursory reading of the case reveals that Jefferson Lines sold tickets for interstate bus travel in Oklahoma.[177] It had both personnel and property (buses) in the state.[178] It would have been frivolous to argue that Jefferson Lines lacked the requisite physical presence to satisfy the Commerce Clause. Therefore, *Jefferson Lines* was irrelevant to *Orvis'* analysis of what level of physical presence[179] constitutes "substantial presence."

4. Reliance on National Geographic's Standard.—Orvis relied on *National Geographic* in its conclusion that the appropriate amount of physical presence should be "demonstrably more than a slightest presence." The court stated that "[w]hile a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence.'"[180] This, however, is not what *National Geographic* stated. The relevant language from *National Geographic* is "[o]ur affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus."[181] The *National Geographic* Court did not say

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176. *Orvis*, 654 N.E.2d at 960.

177. *Jefferson Lines*, 514 U.S. at 184

178. *Id.*

179. Moreover, the *Orvis* decision ignores an obscure part of *Quill*. Quill did have property in North Dakota, its licensed software. The Supreme Court stated that presence would not constitute a substantial nexus. *Quill*, 504 U.S. at 215 n.8. Evidently, there are some instances where a physical presence cannot constitute a substantial nexus. The *Orvis* court effectively converted the rule in *Quill* which is that no collection duties could be imposed on an out-of-state retailer without physical presence into a rule that where there is more than the slightest physical presence, there is necessarily a substantial nexus justifying the imposition of collection duties.

180. *Orvis*, 654 N.E.2d 960-61 (quoting National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 556 (1977)).

181. *National Geographic*, 430 U.S. at 556.

how much more of a presence was required than the slightest presence. Rather, it simply dismissed California's "slightest presence" standard without comment.

5. Summary of New York's Standard.—In summary, the New York court has come as close as possible to overruling the Supreme Court in *Quill* while still maintaining that it is upholding the Supreme Court's intent. More significantly, the result of the New York decision, that Orvis and VIP must collect New York's use tax, is defensible under either the "demonstrably more than a slightest presence" standard the court adopted or the "substantial physical presence" standard the court despises.

The reason the decision is justifiable under either of the standards is that any decision inevitably turns on a factual characterization[182] of the level of physical presence that Orvis and VIP have in New York. In VIP's case, the fact that there were forty-one trips to New York for the roughly 150 transactions during the audit period is probably enough to characterize VIP's presence as substantial in relation to the number of transactions. Of course, as VIP and Orvis argue, it is also plausible that their presence was not "substantial." Likewise, under New York's purported test, it is arguable that Orvis' twelve visits to New York were either de minimis or a "slightest presence" or, conversely, that they were "demonstrably more than a slightest presence." What is this beginning to sound like? It sounds like both tests degenerate into a fact-based case-by-case analysis that the New York court and the Supreme Court purported to remove with their standards.

Although the U.S. Supreme Court has provided many clues as to what will create a "substantial nexus," it is still debatable as to whether activity described as creating a "substantial physical presence" is required or whether activity described as "demonstrably more than a 'slightest presence'" is required. Under either standard, a lot of activity could legitimately be argued as either meeting or not meeting the standard. The two standards are merely shifts in the line either in favor of taxpayers or in favor of the states.

It was inevitable that in the aftermath of the Supreme Court's denial of certiorari of *Orvis*, other state courts would move to expand their definitions of "substantial nexus" in line with New York's "demonstrably more than the 'slightest presence'" standard in order to capture more revenue.

The first state to adopt verbatim, the New York standard was Illinois. In *Brown's Furniture, Inc. v. Wagner*,[183] the Illinois Supreme Court held that a substantial nexus existed when a Missouri furniture retailer, located close to the Illinois border, made 942 deliveries to Illinois customers in one year using its own trucks and employees.

The court, undoubtedly seeing the Supreme Court's denial of certiorari as a green light to expand its taxation powers, held that "[t]he Orvis court stated—correctly, we believe, the rule regarding substantial nexus."[184]

Of course, what is truly noteworthy about *Brown's Furniture* is that the

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182. This is true of many dormant Commerce Clause cases. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

183. 665 N.E.2d 795 (Ill. 1996).

184. *See id.* at 802.

furniture retailer's presence in the state was overwhelming. Unlike VIP, who made an average of 17 trips to New York a year and Orvis who made between 12 and 76 visits to New York per year, Brown's Furniture made 942 deliveries to customers in Illinois in one year! This is an average of almost three deliveries per day. To say that three deliveries per day is not regular and systematic enough to satisfy *Quill's* substantial nexus test is to ignore entirely the *Quill* opinion. The Illinois court certainly did not need to adopt *Orvis'* erroneous, overreaching, standard to find that Brown's Furniture had a substantial nexus with Illinois.

IV. How Should *Quill*'s Physical Presence Standard Be Applied?

Should, as in *Orvis*, *Quill's* physical presence be construed to mean "demonstrably more than a slightest presence?" No. Requiring an entity to have a "physical presence" is not the same as requiring the entity to have "demonstrably more than a slightest presence." *Orvis* adopted a reading of *Quill's* standard close to the standard the Supreme Court rejected in *National Geographic.*[185] Although activity that constitutes a "physical presence" can rightly be described as "demonstrably more than a slightest presence," the converse is not necessarily true. Instead of relying on certain rationales discussed in *Quill* to frame new rules on the fringe of the standard, state courts should consider whether, given the facts before them, the retailer's activities could reasonably be described as constituting a "physical presence" in the taxing state.

In determining whether a given taxpayer's activities reasonably constitute a "physical presence," courts should be guided by *Quill's* examples of the activities that would constitute a physical presence. *Quill's* example of an activity that would satisfy the physical presence requirement was the presence in the taxing state of a "small sales force, plant, or office."[186] Courts should also look at other activities that would reasonably indicate that a retailer has a physical presence in the taxing state. These might include telephone listings indicating a local number, business cards with an in-state address, retail outlets, and others.

However, the courts should refrain from attempting to redefine the physical presence requirement in the light most favorable to state taxing authorities. As previously mentioned, *Quill* discussed several reasons for requiring a physical presence that do not support redefining "physical presence" as "demonstrably more than a slightest presence." Additionally, it is not unfair or inequitable to deny states the power to make out-of-state retailers collect their use taxes.

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185. Recall that *National Geographic* flatly rejected California's "slightest presence" standard in 1977. *See supra* Part I.B. *But see* Multistate Tax Commission, *Nexus Guideline for Application of a Taxing State's Sales and Use Tax to a Remote Seller (DRAFT)*, <http://www.http://www.aimnet.com/~software/industry_issues/home> (Jan. 25, 1995). The MTC's draft encourages a broad reading of activities creating a physical presence and encourages the adoption of a "deemed physical presence" as being sufficient to constitute "substantial nexus."

186. Quill Corp. v. North Dakota, 504 U.S. 298, 315 (1992).

A. Quill's *Rationales*

Although *Quill* gave several reasons for upholding the physical presence requirement, two of those do not support characterizing *Quill's* physical presence standard in the way that favors state governments at the expense of interstate commerce. First, *Quill* retained the physical presence standard to prevent states from placing undue burdens on interstate commerce.[187] Second, Quill made it clear that Congress, not the states, could change the standard or remove the barriers to taxation if it desired. Each of these reasons is discussed in turn.

1. Prohibiting Undue Burdens on Interstate Commerce.—In increasing the states' power to tax retailers with less physical presence than the Supreme Court's standard indicates, courts will increase the burdens on out-of-state retailers. These burdens will naturally affect smaller businesses more than established retailers, creating barriers to entry in the mail-order retailing markets and burdening small business.[188] For a small business to have to comply with the complexities of the differing state and local sales and use tax laws of the roughly 6500 tax jurisdictions in the United States is more than burdensome; it can be cost prohibitive.[189] In addition to complying with the taxing statutes of those jurisdictions, retailers are faced with the daunting task of complying with the more than ninety different sales and use tax rates imposed by those jurisdictions.[190] Requiring businesses to hire full time tax advisors to investigate, read, understand, and comply with these statutes or risk substantial penalties and interest is unduly burdensome and will discourage even the most optimistic entrepreneurs.

Additionally, under New York's standard, retailers may be concerned with how many trips they make to a state. If a customer needs assistance with the seller's product, the retailer must now face the uncertainty of wondering whether this trip is the one that will make its activity "demonstrably more than a slightest presence." Using *Quill's* examples as an analogy, however, sporadic trips to a state would not constitute a substantial nexus because no physical presence would be *maintained* in the taxing state.

Amid aggressive state taxation, businesses must ponder whether a competitor is gaining an advantage by not charging use tax to its customers. Simultaneously, they must legitimately be concerned that if they do not collect the tax, they might be subject to a court's interpretation that their presence was (under the New York standard) "demonstrably more than a slightest presence" and that they may be forced to pay heavy penalties and interest, plus the taxes that were not collected.

Requiring a "physical presence," as defined in *Quill* by the presence of an

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187. *Id.* at 314-15.

188. *See* Loberg, *supra* note 46, at 626 & n.208. Quill, which sells $200 million a year in products, was one of the country's largest mail order retailers. However, 94% of mail order retailers have sales of less than $12.5 million annually. *Id.*

189. *See generally* Krill, *supra* note 10.

190. *See* Loberg, *supra* note 46, at 626-27 & nn.210-12. In 1967, when *Bellas Hess* was decided, there were only eight different rates. In 1992, when *Quill* was decided, over 90 different rates existed. *Id.*

actual plant or office or a small sales force in a given state, will alleviate these concerns. When a retailer opens an outlet in a state or maintains a sales force there, it is not as burdensome on that retailer to require the collection of the state's use tax. Under those circumstances, the retailer must comply with a myriad of other state and local laws, not just sales and use tax collection laws. The retailer who does not have an office in that state, however, is not nearly as prepared to deal with these same regulations.

2. *Only Congress Can Allow States to Burden Interstate Commerce.*—A second reason the *Quill* decision should not be read in a way that reflects a bias in favor of state governments is that the Court made it clear that Congress, *and not the states,* could legislate away *Quill's* holding if Congress thought the standard was unfair to the states. If states are concerned that they are not able to impose the duty to collect their use tax on retailers, they are not without remedy. They simply need to turn to Congress and argue for laws they think will allow them to force retailers to collect their taxes. As mentioned, Congress passed legislation regarding income tax nexus when it saw fit.[191] If Congress is convinced that *Quill* is too restrictive on the states, it can similarly pass use tax collection legislation.

B. State Governments' Other Option

Until the Supreme Court issues a more definitive ruling or until Congress issues guidelines allowing a state to force out-of-state retailers to collect its use tax, the states are not without remedies. They can directly collect the tax from the consumers. Although some states may argue that this is too difficult, several have begun collection efforts. In fact, Maine has been quite successful in its attempts to collect the use taxes from its residents and has incurred only nominal enforcement costs.[192] In any case, the fact that the tax is not easy to collect from consumers should not be an overriding factor in determining how broad a state's taxing powers should be under the Commerce Clause.

CONCLUSION

The U.S. Supreme Court, in *Quill*, upheld *Bellas Hess'* physical presence requirement for Commerce Clause nexus. Its standard, however, does not provide mail order retailers and states the bright-line rule it proclaims. Until the Court revisits the issue and issues a more definitive ruling, or until Congress legislates on the issue, uncertainty over the standard will increase the costs of business for those retailers in the gray area and litigation with aggressive states will continue to plague the industry.

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191. *See* Gillman, *supra* note 110.

192. *See* Krill, *supra* note 10, at 1431 & nn.159-62.